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No. _____

In the
Supreme Court of the United States
October Term, 1994

CAROL A. GERACI,

Petitioner,

vs.

ECKANKAR, a California nonprofit corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Establishment Clause of the First Amendment bars state statutory remedies against a church for gender-based employment discrimination and reprisal where the church terminated a female employee performing only secular duties, ostensibly because she was excommunicated, and where sufficient evidence existed that the reason claimed for her discharge was a pretext for discrimination and reprisal?

2. Whether the duties of a computer programmer are purely secular or a "core ecclesiastical matter" so as to constitutionally bar any judicial inquiry into the question of whether Petitioner's excommunication, as the ostensible reason for discharge, was a pretext for gender-based employment discrimination and reprisal under state law?

3. Whether the Religious Freedom Restoration Act of 1993 is unconstitutional?

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to the proceedings in the Minnesota State Courts.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994
No.

CAROL A. GERACI

Petitioner,

vs.

ECKANKAR, a California nonprofit corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

OPINIONS BELOW

The Minnesota Court of Appeals issued an opinion in this case, a copy of which appears in the Appendix to this Petition at p. A-2. The opinion has been reported as 526 N.W.2d 391 (Minn. App. 1995). On March 14, 1995 the Minnesota Supreme Court denied review. A copy of the Order of the Minnesota Supreme Court appears in Appendix A at p. A-1.

JURISDICTION

The decision denying review by the Supreme Court of Minnesota was entered on March 14, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTE INVOLVED

Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (1994).

STATEMENT OF CASE

Petitioner Carol A. Geraci was hired as a computer programmer by Respondent Eckankar in 1989. She was hired to work on Eckankar's computer system and her duties included helping install a new computer system. Her job duties were wholly secular. She was terminated on August 6, 1991 after refusing to abandon her claims of gender-based discrimination.

The record discloses that Eckankar's spiritual director acknowledged Geraci's complaint of unlawful employment discrimination shortly after June 21, 1991. On July 10, 1991, she was forced to take a leave of absence and told she

must consider the consequences of complaining of unlawful treatment. Thereafter, Eckankar's spiritual director asked Geraci to abandon her legal claims of gender-based discrimination. Eckankar apparently teaches that individuals -- including employees -- are supposed to work out problems with "divine love." If a problem cannot be worked out with "divine love", an employee must step back and leave it alone or she may lose her job. When Geraci refused to give up her legal claims, she was fired. Eckankar claims Geraci was discharged because she lost her faith.

In July 1992, Geraci commenced the instant wrongful discharge action under Minnesota's Human Rights Act, Minn. Stat. § 363. (1994) claiming discrimination and reprisal and also asserted common law claims. Eckankar answered the Complaint, alleging that the "First Amendment prohibits judicial review" of its actions. In other papers filed in court, Eckankar alleged its actions were not subject to review by a "secular court" since all employment decisions are "fundamentally connected to issues of church doctrine and practice" and because the decision to terminate Geraci was subject to an "ecclesiastical review process." Eckankar alleged every employee's job was a "core ecclesiastical matter", even if the employee's duties were purely secular in nature and the duties were not, in themselves, religious.[1]

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[1]Eckankar's spiritual director explained how each employee is involved in core ecclesiastical matters as follows:

Q: Now you've also indicated in the same paragraph of your Affidavit that each employee at church headquarters occupies a position at the heart of church administration. I take it by that that there is no employee, then, that is outside the heart of the church:

A: Every employee because of where they work physically is in quite a position of trust.

. . .

(continued...)

Prior to any discovery conducted, Eckankar received summary judgment on all discharge-based claims. The trial court, relying on the reasoning in Black v. Snyder, 471 N.W.2d 715 (Minn. App. 1991), *pet. for rev. denied* (Minn. Aug. 29, 1991), allowed her day-to-day discrimination claims to proceed. After limited discovery, summary judgment was granted on the remaining claims with one minor exception.

Although Eckankar asserted in the courts below that Geraci was discharged because she lost her faith, the trial court found "sufficient probative evidence" that the religious reason proffered for her discharge was a pretext for unlawful discrimination. The Minnesota Court of Appeals did not contest this finding with respect to the discharge-based claims. The trial court, and the Minnesota Court of Appeals, concluded, however, that Eckankar was entitled to dismissal of Geraci's discharge claims because their enforcement would violate the Establishment Clause of the First Amendment.[2]

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[1](...continued)

Q: So would a janitor that washes the floor at the EIO work at the heart of church administration?

A: Yes.

Q: Would someone that washed the windows work at the heart of administration?

A: If they are inside the building washing them, yes.

Q: On the outside they wouldn't be?

A: If they would not enter our building, then I would say it might be a different story.

Heyl Depo. pp. 159-160.

[2]In its brief filed with the Minnesota Court of Appeals September 19, 1994, Eckankar, for the first time, alleged that the Religious Freedom Restoration Act of 1993 required dismissal of Geraci's claims. Geraci filed a reply in which she questioned the constitutionality of the Act.

The Minnesota Supreme Court denied review and this Petition follows.

REASONS FOR GRANTING THE WRIT

The Court should grant a Writ of Certiorari because the decision, as it now stands, incorrectly interprets the First Amendment and conflicts with federal appellate and U.S. supreme court decisions. The Minnesota Court of Appeals stated:

> The Establishment Clause of the United States Constitution bars judicial review of core ecclesiastical matters, including whether a church's termination of an employee because she was excommunicated is a pretext for gender discrimination.

526 N.W.2d at 394.

On the contrary, this Court, in Ohio Civil Rights Commission v. Dayton Schools, 477 U.S. 619, 628 (1986), held:

> [t]he Commission violates no constitutional rights by merely investigating the circumstances of [the employee's] discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge. (Emphasis added.)

477 U.S. at 628.

Summary judgment cannot be appropriately applied so as to foreclose any factual inquiry into the question of whether ecclesiastical reasons given by a church for discharge are a

mere pretext for unlawful employment discrimination. The Eighth Circuit Court of Appeals cautioned:

> If any or all of the reasons asserted for dismissal are religious, the trial court can use the case-by-case approach to determine those rare cases where a lay employee's relationship with a religious institution is so pervasively religious that even mere pretext inquiry poses a significant risk of First Amendment infringement. We believe this approach is fully consistent with our prior admonition that summary judgments should seldom be used in cases alleging employment discrimination . . . (Emphasis added.)

Weissman v. Congregation Shaare Emeth, 38 F.3d 1038, 1045 (8th Cir. 1994).

The Third Circuit Court of Appeals recognized that religious institutions like Eckankar may be required to litigate the pretext issue without violating the First Amendment:

> The secular tribunal merely asks whether a sincerely held religious belief actually motivated the institution's actions. The institution, at most, is called upon to explain the application of its own doctrines. Such an explanation is no more onerous than is the initial burden of any institution in any First Amendment litigation to advance and explain a sincerely held religious belief as the basis of a defense or claim.

Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324, 330 (3d Cir. 1993).

A. The First Amendment does not grant religious organizations the unrestrained right to discriminate in employment anymore than it allows polygamy, murder or violations of minimum wage laws.

Geraci's claims were dismissed because the courts below held that they could not be adjudicated without inquiry into Eckankar's beliefs. But the First Amendment clearly does not insulate a religious employer from liability for acts against secular employees which would otherwise be unlawful if committed by secular employers. States may lawfully regulate their conduct to protect society. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940). This Court, on prior occasions, has restricted conduct which occurs ostensibly in furtherance of a religious belief. In Reynolds v. United States, 98 U.S. 145, 166-67 (1878), this Court struck down conduct based upon the Mormon Church's belief in polygamy, stating:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious beliefs superior to the law of the land, and in affect permit every citizen to become a law unto himself.

Other decisions of this Court have regulated conduct in furtherance of religious beliefs. See, e.g., Bob Jones University v. U.S., 461 U.S. 574 (1983) (religious beliefs do

not excuse payment of taxes); United States v. Lee, 455 U.S. 252, 261 (1982) (religious belief against payment of taxes does not excuse tax liability); Prince v. Massachusetts, 321 U.S. 158, 171 (1944) (religious belief is not a basis for violating child labor laws); Tony & Susan Alamo Foundn. v. Sec. of Labor, 471 U.S. 290 (1985) (employees of religious organizations are entitled to Fair Labor Standards Act protection). Eckankar may not discriminate in secular employment decisions any more than the employers whose religious-motivated conduct was not excused by this Court.

To Petitioner's knowledge, no court has denied an employee performing predominately secular duties protection under state or federal anti-discrimination statutes. See, e.g., McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972); Vigars v. Valley Christian Ctr., 805 F.Supp. 802 (N.D. Cal. 1992); ; EEOC v. Fremont Christian School, 609 F.Supp. 344 (N.D. Cal. 1984); EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980); EEOC v. Pac. Press Publishing Assoc., 676 F.2d 1272 (9th Cir. 1982). The Equal Employment Opportunity Commission's Policy Guide on religious organizations also reflects this:

> Application of Title VII and/or the EPA to religious discrimination has been found not to violate the free exercise clause in numerous cases, including some which present a direct conflict between the sincerely held religious beliefs and the state interest in eliminating sex discrimination. (Emphasis added.) *EEOC Guide on Pay Discrimination by Religious Organizations*, No. 644 (Feb. 1, 1990).

B. The First Amendment does not permit a church to violate Minnesota's anti-discrimination statute by labeling its discharge decision "core ecclesiastical."

Minnesota's Court of Appeals incorrectly found that because Eckankar claimed Geraci's discharge involved "core issues of ecclesiastical concern" her claims must be dismissed without further inquiry on constitutional grounds. Wisconsin v. Yoder, 406 U.S. 205 (1972), contains the analytical framework.[3] Since Eckankar makes no claim that complying with Minnesota's anti-discrimination law violates its religious beliefs, judicial inquiry and civil liability would not require Eckankar to commit acts "at odds with the fundamental tenets of their religious beliefs" like those acts found unconstitutional in Yoder (state statute requiring teenagers to attend public schools contrary to the religion's beliefs).

Minnesota's compelling state interest in eradicating discrimination outweighs the limited, incidental burden such scrutiny might place on Eckankar. No less restrictive means of enforcing Minnesota's anti-discrimination statute exists. This Court must intervene because the courts below have erroneously held that the mere inquiry, per se, into whether the proffered reasons are pretextual violates constitutional freedoms.

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[3]Courts may not review religious beliefs but must review conduct even by churches. Sherbert v. Verner, 374 U.S. 398 (1963). Religious conduct cases require determining whether the conduct is the type "subject to regulation for the protection of society." Cantwell v. Connecticut, supra at 304.

C. The Religious Freedom Restoration Act of 1993 is unconstitutional.

Minnesota's Court of Appeals applied the RFRA both in its retroactive application and in its compelling interest standard established for interpreting the First Amendment. The RFRA expressly specifies a standard of review which courts must follow. Congress may not require this Court to apply a specific standard of review under the First Amendment. It is the duty of this Court, not the Congress, to interpret the Constitution. Marbury v. Madison, 5 U.S. 137 (1803); Baker v. Carr, 369 U.S. 186 (1962); United States v. Nixon, 418 U.S. 683 (1974) cited in Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1995) (currently on appeal). Minnesota's reliance on the RFRA is misplaced. The need for establishing workable guidelines for interpreting the First Amendment, as recognized by this Court, provides additional reasons for issuing the writ.[4]

CONCLUSION

Where an employee such as the Petitioner, performing only secular, non-ecclesiastical duties as a computer programmer, is discharged for claimed religious reasons, the First Amendment does not bar the courts from determining whether the proffered religious reasons for the discharge are merely a pretext for gender discrimination and reprisal. The Minnesota courts' refusal to apply the state's anti-discrimination law to the discharge, even when the trial court found "sufficient probative evidence" that the proffered religious

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[4]In Board of Education v. Grumet, ___ U.S. ___, 114 S.Ct. 2481 (1994), the test in Lemon v. Kurtzman, 403 U.S. 602 (1971), was criticized in the minority and dissenting opinions and snubbed by the plurality. This Court's guidance is needed.

reason was pretextual, misapplied constitutional law. The holding below exempts from judicial review a religious entity's discharge of any protected class member when the proffered reasons are religious even when evidence of pretext exists. The Minnesota courts' decision, if allowed to stand, seriously undermines the policy of anti-discrimination laws and is incorrect under the First Amendment.

Since McClure v. Salvation Army, supra, over 20 years ago, the federal courts have followed a "minister" exception to determine when "core ecclesiastical" issues are so paramount they preclude a court's inquiry into a church's employment decisions and relationship with its employees. The "minister" exception has been seriously undermined by this decision. Churches may now strip employees of civil rights or other statutory protections with impunity if the decision stands. This Court has previously stated:

> [t]he right to sue and defend in the courts is the alternative to force. In an unorganized society it is the right conservative of all other rights, and lies at the foundation of orderly government. . . . Equality of treatment in this respect is not left open to depend upon comity between the states, but is granted and protected by the Federal Constitution. Chambers v. Baltimore & Ohio Railroad, 207 U.S. 142, 148 (1907).

Two fundamental federal rights stand out in this Petition, the right to equal protection and the right to religious freedom. One must not be exercised to diminish the other.

Petitioner respectfully requests that a writ of certiorari be issued from this Court to review the decision of the Minnesota Court of Appeals.

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STATE OF MINNESOTA

IN SUPREME COURT

CX-94-1506

Carol A. Geraci,

Appellant,

vs.

Eckankar, a California nonprofit corporation,

Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Carol A. Geraci for further review be, and the same is, denied.

Dated: March 14, 1995

BY THE COURT:

s/s

Chief Justice

STATE OF MINNESOTA

IN COURT OF APPEALS

CX-94-1506

Hennepin County
Dist. Ct. File No. 92016722

Schumacher, Judge
Concurring specially, Randall, Judge

Carol A. Geraci,

Appellant,

v.

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Filed: January 17, 1995
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SYLLABUS

1. Under the McDonnell-Douglas test, an employee must present evidence to raise a material issue of genuine fact as to whether an employer's proffered business reasons for an employment decision were a pretext for discrimination in order to defeat a motion for summary judgment.

2. A statement is not defamatory unless it has been communicated to a third person, is false, and tends to harm an individual's reputation.

3. To establish a claim for promissory estoppel the promise must be definite and clear.

4. Enforcement of an employee's gender discrimination and reprisal claims brought against a church employer is barred by the Freedom of Conscience Clause of the Minnesota Constitution where enforcement excessively burdens the church's exercise of its religion.

5. The Establishment Clause of the United States Constitution bars judicial review of core ecclesiastical matters, including whether a church's termination of an employee because she was excommunicated is a pretext for gender discrimination.

6. The compelling interest test must be used when analyzing claims implicating the Free Exercise Clause of the United States Constitution.

Affirmed.

Considered and decided by Randall, Presiding Judge, Schumacher, Judge, and Mulally, Judge.*

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* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

OPINION

SCHUMACHER, Judge

Carol A. Geraci appeals from the partial summary judgment, arguing that the district court erred in (1) granting summary judgment on her terms and conditions gender discrimination claim, defamation claim, and promissory estoppel claim because there were genuine issues of material fact; (2) concluding that the First Amendment of the United States Constitution and Article I, Section 16 of the Minnesota Constitution insulates a religious employer from discharge-based claims brought by a non-minister; and (3) refusing to allow her to discover evidence of pretext for her discharge-based claims. We affirm.

FACTS

Respondent Eckankar, a California nonprofit corporation, is an hierarchial church and religion. It has subordinate churches in 48 states and numerous local groups throughout the world. Its headquarters are in New Hope and the Temple of ECK is in Chanhassen. ECKists believe:

> The universes of the SUGMAD are complete with a hierarchy of highly evolved beings who govern all the worlds according to the laws of their own worlds. * * * IT rules singularly and by divine nature. There are no democratic principles found here.

Paul Twitchell, The Shariyat-Ki-Sugmad, Book One 35 (1987).

> The laws and rules for the ECK chela are simple. These are to give harmony, purity, and perfection of the Soul.

Id. at 100.

Carol Geraci is a 1986 cum laude graduate from City University of New York with a degree in computer science. She became a member of Eckankar in 1986 and a second initiate in May 1989. Shortly thereafter, she applied for a job and was hired as a systems analyst at Eckankar's headquarters. She then moved from New York to Minnesota. The $22,000 per year position included helping install a computer system.

Shortly before hiring Geraci, Eckankar hired another systems analyst, David Tillery. Tillery graduated from the University of Delaware in 1975. After college, he primarily programmed mainframe computers. He also had experience in supervising employees and administering systems. Tillery became systems administrator of the network and immediately had complete access to the network. Geraci was not given complete access until she had worked for Eckankar for 11 months. When Geraci asked to learn the new network, her supervisor, Eric Wollan, told her to read the manuals on her own time. Tillery was paid $25,000 annually.

Geraci discussed her situation with the president and board members of Eckankar. On June 21, 1991, Geraci notified Eckankar's spiritual leader and board members of her complaints and alleged legal violations. On July 9, 1991, Geraci was placed on a leave of absence by Eckankar's director of spiritual services and warned that if she persisted in trying to impose her feelings on the spiritual direction of Eckankar, she would be suspended or excommunicated. In August, Geraci's membership was terminated because of her disregard of the sacred teachings of Eckankar as manifested by her failure to work in harmony with her co-workers. Church membership was a prerequisite for employment at Eckankar's headquarters. Because Geraci was no longer a member, she was terminated.

Geraci sued, alleging statutory sex discrimination and reprisal claims, as well as common law claims for defamation, promissory estoppel, and intentional infliction of emotional distress. The district court eventually granted summary judgment on all claims, except for a defamation claim relating to a coworker calling her insubordinate. Claims involving Geraci's suspension from membership and dismissal, including Count I (gender discrimination), Count II (reprisal), and Count V (intentional infliction of emotional distress), were dismissed under the Establishment Clause of the United States Constitution and the Minnesota Constitution because analyzing the pretext question would cause excessive entanglement and excessively burden Eckankar's exercise of its religious beliefs. Count I involving gender discrimination in the terms and conditions of employment was dismissed because the court found that Geraci failed to present a fact question on the pretext prong of the McDonnell-Douglas test. Count III (defamation) was dismissed because the statements were opinions and were not actionable. Finally, Count IV (promissory estoppel) was dismissed because the "promise" was not clear and definite and therefore not actionable as a matter of law. The district court found there was no just reason for delay, and Geraci appealed.

ISSUES

1. Did the district court err in concluding that Geraci failed to present sufficient evidence to raise a material issue of genuine fact as to whether Eckankar's proffered business reasons were a pretext for discrimination?

2. Did the district court err in concluding that the complained of statements were not defamatory?

3. Did the district court err in concluding that Geraci's claim for promissory estoppel failed because the promise was not definite and clear?

4. Does the Minnesota Constitution bar judicial review of Geraci's discharge-based claims?

5. Does the Establishment Clause bar judicial review of Geraci's discharge-based claims?

6. Did the district court err in applying the Smith test when analyzing Eckankar's Free Exercise clause defense?

ANALYSIS

On appeal from summary judgment, we determine whether there are any issues of material fact and whether the district court correctly applied the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). Geraci argues that summary judgment was improper on her terms and conditions of employment discrimination claim, her promissory estoppel claim, and her defamation claims because there were material issues of fact.

1. Under Minnesota law, it is an unfair employment practice for an employee to discriminate with respect to terms or conditions of employment on the basis of sex except when based on a bona fide occupational qualification. Minn. Stat. § 363.03, subd. 1(2) (c) (1992). For indirect discrimination claims, Minnesota has adopted the three-part McDonnell-Douglas test. Sigurdson v. Isanti County, 386 N.W.2d 715, 719-21 (Minn. 1986). Under this test, an employee must present a prima facie case of discrimination; the burden of persuasion then shifts to the employer to present a legitimate nondiscriminatory reason for its actions; and the burden then returns to the employee to show that the employer's justification is a pretext for discrimination. Id. at 720.

The district court found that Geraci presented a prima facie case of gender discrimination with regard to her terms and conditions of employment because she was a member of a protected group; she was qualified; but despite her qualifications, she was paid less and given less access to the

computer system than her male counterpart. Eckankar acknowledged that Tillery was paid more than Geraci, but stated that he was given different assignments and received complete access to the computer system before Geraci because he had more experience in network administration and supervising employees. The court found that Geraci was unable "to show a pattern of salary or job duty inequality based on gender" and did not offer "sufficient evidence to establish the existence of a genuine issue of material fact on the question of pretext."

On appeal, Geraci claims that she set forth sufficient probative evidence on the issue of pretext to defeat the summary judgment motion, including the facts that Tillery was not more qualified nor had greater responsibilities than Geraci, and Dorothy Laurence, an Eckankar employee, was paid less than the four males she supervised. We disagree.

The fact that one female manager, in a 70-person organization, was paid less than the males she supervised is not sufficient to present a fact question on the issue of pretext, especially when there was a business reason why she was paid less: it was a temporary position. Moreover, Geraci's male replacement was paid less than she, commensurate with his experience. In addition, while Geraci and Tillery were hired at the same level on the organizational chart, Tillery had significant experience in systems administration; Geraci had none. Thus, it appears this was a legitimate business decision to give Tillery more responsibility and pay him $3,000 more than Geraci. We note that Geraci and Tillery did not supervise other employees. Tillery, however, worked with others while supervising projects; therefore, it was not improper to take into account Tillery's prior supervisory experience.

By notice of review, Eckankar contends that judicial review of this claim was improper on constitutional grounds because the context of Geraci's employment was pervasively religious. We disagree. If an employee's claims may be

resolved by relying on neutral methods of proof, the religion clauses do not prevent review. Black v. Snyder, 471 N.W.2d 715, 720, (Minn. App. 1991) (citing Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354, 1360-61 (D.C. Cir. 1990)), pet. for rev. denied (Minn. Aug. 29, 1991). Geraci's claims were based on disparity in pay, job duties, and access to the computer system. Eckankar did not allege that the disparity was based on religious reasons, but because of Tillery's superior experience. Because inquiry into these issues did not involve ecclesiastical matters, judicial review was proper.

2. A statement is defamatory if it (1) has been communicated to a third party; (2) is false; and (3) tends to harm the individual's reputation and lowers him or her in the community's estimation. Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 255 (Minn. 1980). Before 1990, some federal circuit courts held that statements of opinion were absolutely protected from defamation suits under the First Amendment. Huyen v. Driscoll, 479 N.W.2d 76, 79-80 (Minn. App. 1991) (citing Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302 (8th Cir. 1986), cert. denied, 479 U.S. 883 (1986); Ollman v. Evans, 750 F.2d 970, 975 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127 (1985)), pet. for rev. denied (Minn. Feb. 10, 1992). In Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S. Ct. 2695 (1990), the Supreme Court made clear that not all opinions were protected and that the distinction between fact and opinion employed by the lower courts was artificial. Id. at 18-21, 110 S. Ct. at 2705-07. The Court held that only statements about matters of public concern not capable of being proven true or false and statements that cannot be interpreted reasonably as stating facts are protected from defamation actions under the First Amendment. Id.; see also McGrath v. TCF Bank Sav., 502 N.W. 2d 801, 808 (Minn. App. 1993), aff'd as modified, 509 N.W.2d 365 (Minn. 1993). This court has stated, however,

that the pre-Milkovich test and case law are still instructive to determine if a statement is actionable pursuant to Milkovich. McGrath, 502 N.W.2d at 808; Huyen, 479 N.W.2d at 80. The four-factor test examines the statement's (1) specificity and precision, (2) verifiability, (3) literary and social context in which it was made; and (4) public context. McGrath, 502 N.W.2d at 808. Whether a statement can be interpreted as stating facts or can be proven false is a question of law. Id.

Here, the district court found that a statement by Tillery to an unidentified job candidate that an employee [Geraci] was not "technically strong" was not actionable because Tillery did not refer to Geraci by name. There is no indication in the record that the job candidate knew Geraci or knew that Geraci worked for Eckankar. Thus, the statement was not defamatory because Geraci's reputation in the community could not have been affected. See Stuempges, 297 N.W.2d at 255.

Next, the district court found that the statement that Geraci did not "have the technical expertise to work on that, or to do something" was not defamatory because without the context of the alleged lack of technical expertise there could be no harm to Geraci's reputation. The record does not provide the underlying facts of this statement. It is possible that Geraci did not have the technical expertise to work on "it" and thus the statement is not actionable because it is true. See Stuempges, 297 N.W.2d. at 255. Moreover, Geraci's reputation cannot be injured if no one can tell from the statement in what area Geraci is lacking technical expertise. See id.

Finally, the district court found that the statements that Geraci "had poisoned the board," was "out of control," "a bad influence, "emotional," and "not a team player" were published and would tend to lower her reputation in the community. The court concluded, however, that these claims were not

actionable because they do not contain facts or factual connotations that can be proven false.

Geraci argues that the court should have used the four prong test and that these statements would harm her reputation. A district court need not use the four prong test; it is only a tool. See Huyen, 479 N.W.2d at 80. In addition, the issue is not whether the statements would harm her reputation, but whether the statements are not subject to a defamation claim because of the First Amendment's protection of free speech. These statements were not of public interest. Cf. Hunt v. University of Minn., 465 N.W.2d 88, 94 (Minn. App. 1991) (qualifications of public employee is of public interest). Second, the statements could not reasonably be interpreted as stating facts. See, e.g., McGrath, 502 N.W.2d at 808 ("troublemaker" not actionable); Huyen, 479 N.W.2d at 80 (statements referring to "insufficient level of accountability," "uneven use of authority," "unwillingness to participate" not actionable); Lund v. Chicago & Northwestern Transp. Co., 467 N.W.2d 366, 368-69 (Minn. App. 1991) ("favoritism," "move-ups," "brown nose" not actionable), pet. for rev. denied (Minn. June 19, 1991); Lee v. Metropolitan Airport Comm'n, 428 N.W.2d 815, 821 (Minn. App. 1988) ("fluffy," "b-tch," flirtatious not actionable). But see Weissman v. Sri Lanka Curry House, Inc., 469 N.W.2d 471, 473 (Minn. App. 1991) ("dishonest" actionable).

Geraci argues that other allegedly defamatory statements were not considered by the district court. These statements, however, were not presented to the district court in Geraci's response to Eckankar's motion for summary judgment. An appellate court's scope of review is limited to issues considered and decided by the trial court. Krueger v. State Farm Fire & Casualty Co., 510 N.W.2d 204, 209 (Minn. App. 1993). Because these statements were not presented to or decided by the district court, we decline review.

3. Next, Geraci argues that Eckankar's request for a two-year time commitment from Geraci implied a reciprocal promise that Eckankar must employ Geraci for a minimum of two years. Geraci cites no precedent for her theory and we decline to adopt it.

> [A] promise which is expected to induce definite action by the promisee, and does induce the action, is binding if injustice can be avoided only by enforcing the promise.

Cohen v. Cowles Media Co., 479 N.W.2d 387, 391 (Minn. 1992) (citing Restatement (Second) of Contracts § 90 (1) (1981)). The promise must be definite and clear. Id. The district court determined that there was no "clear and definite promise to provide employment for two years." We conclude summary judgment was appropriate because the court correctly applied the law and there were no material issues of fact.

4. The district court found that Geraci offered sufficient evidence to establish the existence of a genuine issue of material fact regarding the merits of her discharge-based claims and whether her excommunication was a pretext for her discharge. The court, however, ruled that inquiry into Eckankar's proffered reasons for termination, that is, her excommunication, was impermissible under the United States and Minnesota Constitutions.

The Minnesota Constitution provides:

> The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his

> consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state.

Minn. Const. art. I, § 16. The freedom of conscience clause has a four-prong test: (1) whether the objector's belief is sincerely held; (2) whether the regulation burdens the exercise of religious beliefs; (3) whether the state's interest in regulations is compelling: and (4) whether the state regulation uses the least restrictive means. Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 865 (Minn. 1992)

The Minnesota Constitution affords greater protection of religious freedom than the United States Constitution. State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990).[1] The First Amendment limits the government from prohibiting the exercise of religion. Section 16, however, precludes even "an infringement on or an interference with religious freedom." Id. Government actions that do not prohibit religious practices could still violate the Minnesota Constitution if they interfere with those religious practices. Id. Moreover, the Constitution prohibits the judiciary, as well as the legislature, from violating free exercise rights. Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190, 191, 80 S. Ct. 1037, 1038 (1960).

Geraci does not dispute that Eckankar's religious beliefs are sincerely held, but contends that application of the Minnesota Human Rights Act to Eckankar does not excessively burden Eckankar's religious beliefs. Geraci,

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[1] At the time Hershberger was decided, the Supreme Court used the Smith test when analyzing free exercise issues. Hershberger, 462 N.W.2d at 396.

relying on Hill-Murray, argues that application "may affect how Eckankar treats its employees, but it does not affect its religious belief." We disagree.

We begin by recognizing that the Minnesota Human Rights Act (Act) has been held constitutional on its face and as applied to private companies whose owners held strict religious beliefs. State by McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 854 (Minn. 1985); State by Johnson v. Porter Farms, Inc., 382 N.W.2d 543, 548 (Minn. App. 1986). Those cases did not involve an application of the Act to a church and are not controlling. In addition, the Act exempts a religious organization with respect to religious qualifications when religion is a bona fide occupational qualification.[2] Minn. Stat. § 363.02, subd. 1 (2) (1992). Geraci has not brought a claim for religious discrimination. Thus, the issue is not whether Eckankar permissibly or impermissibly discriminated against Geraci on the basis of religion, but whether the court can resolve whether Eckankar discriminated against Geraci on the basis of gender or whether there was reprisal without violating Eckankar's First Amendment right to the free exercise of religion. We hold we cannot.

Eradication of discrimination is a compelling state interest. Sports & Health Club, 370 N.W.2d at 854. There is no objection that Eckankar's beliefs are sincerely held. Further application of the Act to Eckankar, however would excessively burden its religious beliefs. In Hill-Murray, the Minnesota Supreme Court concluded that application of the Labor Relations Act to lay employees of a parochial school would not violate the First Amendment because the terms and conditions of employment were "not doctrinally related and [were] negotiable." 487 N.W.2d at 866. The court also found that Hill-Murray still had the power "to require compliance

[2] The Supreme Court has held that such a religious based exemption does not violate the Establishment Clause. Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 338, 107 S. Ct. 2862, 2869 (1987).

with religious doctrine" and could "remove any person who fail[ed] to follow the religious standards." Id. Here, Eckankar claims it discharged Geraci because she was no longer a member. Further litigation of Geraci's claims would require a court to question Eckankar's monitoring of Geraci's adherence to church doctrine, its reasons for excommunication, and the veracity of Eckankar's responses. On such matters, "the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content." Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (citing Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 720, 96 S. Ct. 2372, 2385 (1976)), cert. denied, 478 U.S. 1020 (1986). If courts begin to question a church's basis for doctrinal decisions, a church may be compelled to conform its religious beliefs with the government's or the majority culture's beliefs. See Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116, 73 S. Ct. 143, 154 (1952) (religious organizations should be free from "secular control or manipulation"); see also Frederick M. Gedicks, Toward a Constitutional Jurisprudence of Religious Group Rights, 1989 Wisc. L. Rev. 99, 111-12 (explaining Mormons, abandonment of polygamy due to government interference). There is a tension between eradicating discrimination and permitting the free exercise of religion; however, in this case, the balance weighs in favor of the First Amendment.

5. The Establishment Clause prohibits law-making "respecting an establishment of religion." U.S. Const. amend. I. The district court held that Geraci's discharge-based claims were barred under the Establishment Clause because judicial review would constitute excessive entanglement. Geraci contends that the district court erred in applying this clause to prevent review of her claims, arguing that the clause only bars review of employment decisions involving ministers and clergy. Eckankar responds that courts must abstain from exercising jurisdiction over any claims involving church

doctrine, faith, or discipline whether or not they involve a member of the clergy.

First, Geraci's reliance on the "minister" exception to Title VII is misplaced. The fifth circuit was the first court to recognize this exception. McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 896 (1972). The McClure court found that applying Title VII to the employment of ministers would violate the free exercise clause. Id. at 560. The court expressly refrained from addressing a church-non-minister relationship. Id. at 555. Later cases made attempts to determine whether there was a church-minister relationship in order to apply the bright-line rule. See, e.g., Rayburn, 772 F.2d at 1168 (McClure exception not dependent upon ordination, but upon function of position); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 285 (5th Cir. 1981) (ordained ministers working as support personnel in seminary do not fall under McClure exception thus EEOC regulations apply). We conclude that McClure and its progeny do not dispose of this case because it is only a narrow exemption to Title VII in order to accommodate religious employers' free exercise rights.

Second, we note that the district court and both parties applied the Lemon test. We question Lemon's continuing vitality subsequent to the Supreme Court's decision in Board of Educ. v. Grumet, __ U.S. __, 114 S. Ct. 2481 (1994), where the court did not rely on Lemon, but used neutrality principles when analyzing the Establishment Clause. See id., __ U.S. at __, 114 S. Ct. at 2515 (Scalia, J., dissenting) (noting Court's "snub of Lemon"). We conclude, however, that under either type of analysis the courts may not review Geraci's discharge-based claims.

Under the Lemon test, the government action must: (1) have a secular purpose; (2) neither inhibit nor advance religion as its primary effect; and (3) not create excessive entanglement

between church and state. Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111 (1971). Under Grumet, governmental power must be exercised in a religiously neutral manner. __ U.S. at __, 114 S. Ct. at 2491.

The parties agree that the Minnesota Human Rights Act has a secular purpose and that its primary effect is not to inhibit religion. The question is whether there is excessive entanglement or whether the governmental action is religiously neutral. Whether governmental action causes excessive entanglement depends on the nature of the intrusion into religious administration, the character and purpose of the involved institutions, and the resulting relationship between the religious authority and the government. Lemon, 403 U.S. at 614-15, 91 S. Ct. at 2112.

The Minnesota Supreme Court has held that the First Amendment does not bar the application of Title VII to private businesses whose owners hold sincere religious beliefs. Sports & Health Club, 370 N.W.2d at 854; Porter Farms, 382 N.W.2d at 548. Here, however, the institution involved is a church and the governmental action intrudes into the administration of that church. Accordingly, Sports & Health Club and Porter Farms are not dispositive.

If claims involve core issues of ecclesiastical concern, government entanglement prevents judicial review. Serbian Orthodox Diocese, 426 U.S. at 721-23, 96 S. Ct. at 2386-87; Minker, 894 F.2d at 1360; Black, 471 N.W.2d at 720. If the dispute, however, can be resolved on neutral methods of proof, judicial review is permissible. Minker, 894 F.2d at 1360, Black, 471 N.W.2d at 720.

The district court found that Geraci "does not dispute the fact that her membership in Eckankar was a condition of her employment. Eckankar claims that, because church membership is a requirement of employment, it terminated Geraci because she was excommunicated. The parties were unable and we cannot devise a way to determine if this reason

for termination was a pretext for discrimination without questioning the reasons for the excommunication and the veracity of those reasons. See Minker, 894 F.2d at 1360-61 (inquiry into church's reasons for rejecting person for pastorship, even for pretext, would cause entanglement). Such a searching inquiry is barred by the First Amendment.[3]

6. Geraci contends that the district court correctly concluded that the Free Exercise Clause did not bar review of her claims. Eckankar responds that the district court erroneously applied the Smith test, instead of the compelling interest test and that enforcement of Geraci's claims would excessively burden Eckankar's exercise of religious freedom.

In Employment Div. Dept. of Human Resources v. Smith, 494 U.S. 872, 110 S. Ct. 1595 (1990), the Supreme Court held that the Free Exercise Clause does not bar the application of a neutral generally applicable state law that incidentally burdens the free exercise of religion. 494 U.S. at 878-79, 110 S. Ct. at 1600. Here, the district court applied the Smith test and determined that enforcement does not bar Eckankar's free exercise rights. Congress, however, passed the Religious Freedom Restoration Act of 1993, which restored the

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[3] In Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., a parochial school would not renew a pregnant teacher's employment contract allegedly because, under its religious doctrines, mothers should stay home with preschool age children. 477 U.S. 619, 623, 106 S. Ct. 2718, 2720-21 (1986). The teacher then threatened to bring a discrimination claim. Dayton rescinded its nonrenewal decision, but fired the teacher because she did not resolve her dispute internally as mandated by church doctrine. Id. The United States Supreme Court held that a state agency may exercise jurisdiction over the claim and preliminarily investigate "the circumstances of [the teacher's] discharge * * *, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge" without violating Dayton's First investigation. Moreover, the Court stated that Dayton will no doubt "receive an adequate opportunity to raise its constitutional claims" either at the administrative level or in state court. Id.

compelling interest test to the Free Exercise Clause. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as 42 U.S.C. § 2000bb). The legislation applies to all federal and state laws and is retroactive. Id.; see also Brown-El v. Harris, 26 F.3d 68, 69 (8th Cir. 1994) (Act applies retroactively). Generally, a court is required to apply the law that is in effect at the time it renders its decision. McClelland v. McClelland, 393 N.W.2d 224, 226-27 (Minn. App. 1986), pet. for rev. denied (Minn. Nov. 17, 1986). Here, the district court should have applied the compelling interest test. Because we conclude that Geraci's discharge-based claims are barred by the Establishment Clause and Minnesota's Freedom of Conscience Clause, however, the issue is moot.

Geraci argues that the court erred in restricting discovery on issues of pretext. Because we determined that the district court correctly determined that judicial review of the discharge-based claims was constitutionally barred, we likewise conclude the court did not abuse its discretion in restricting discovery once those claims were dismissed. Because we rule in Eckankar's favor, we do not address its freedom of expression and association claim.

DECISION

The district court correctly dismissed Geraci's terms and conditions of employment, defamation, and promissory estoppel claims because there were no genuine issues of material fact and the court correctly applied the law. The district court properly dismissed Geraci's discharge-based claims because judicial review was forbidden by the United States and Minnesota Constitutions.

Affirmed.

s/s
ROBERT H. SCHUMACHER
1/9/95

RANDALL, Judge (concurring specially).

I concur in the result, but conclude that Carol Geraci did not even make a prima facie showing of employment discrimination under McDonnell-Douglas. The undisputed facts show only that the employer had legitimate non-discriminatory reasons for its decisions. I find no issues of material fact supporting a prima facie case.

To establish a prima facie case of discrimination, the plaintiff must present proof of discriminatory motive. Sigurdson v. Isanti County, 386 N.W.2d 715, 720 (Minn. 1986) ("A prima facie case may be established by direct evidence of discriminatory motive"). Where the plaintiff cannot produce such direct evidence, the plaintiff may still present a prima facie case by showing that: (1) plaintiff is a member of a protected group; (2) plaintiff sought and qualified for opportunities that the employer made available to others; (3) despite being qualified, plaintiff was denied these opportunities; and (4) after plaintiff was denied, the opportunities remained available or were given to other persons with plaintiff's qualifications. Id. For wage discrimination claims, the plaintiff must show that the employer paid different wages to employees of opposite sexes for equal work on jobs requiring equal skills, effort, and responsibility. Kolstad v. Fairway Foods, Inc., 457 N.W.2d 728, 734 (Minn. App. 1990).

Here, the record shows Tillery, who was given opportunities Geraci was not, was qualified in ways that Geraci was not. Tillery had approximately eleven years experience in computer systems analysis, programming mainframe computers, supervising employees, and computer network administration. When Geraci was hired, she had recently graduated from college, had some experience in computer design and programming, but had no experience in computer network administration. After Geraci's termination,

her male replacement was given some responsibilities formerly performed by Tillery and Geraci, and paid substantially less than Geraci because he had even less experience.

Geraci had to show that she sought and was qualified for opportunities that the employer was making available to others. See Sigurdson, 386 N.W.2d at 720. Tillery had experience maintaining computer networks and was qualified to administer the employer's computer network here. Geraci did not have experience administering computer networks. Further, Tillery's and Geraci's duties involved different skills and responsibilities. See Kolstad, 457 N.W.2d at 734. Tillery's additional responsibilities and slightly higher income were not surprising in view of his superior experience.

Rather than supporting a prima facie case of employment discrimination, the facts present exactly the type of factors employers and managers regularly and legitimately use in delegating authority and in setting employee salaries.

s/s
1/9/95

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Carol A. Geraci,

Plaintiff,

ORDER AND MEMORANDUM

vs.

Case No. 92-16722

Eckankar, a California nonprofit corporation,

Defendant.

This case was heard on November 18, 1992 pursuant to plaintiff' s amended motion to compel, defendant's motion for a protective order, and defendant's motion for the entry of summary judgment dismissing plaintiff's claims with prejudice. David J. Duddleston, Esq., and Tony Branch, Esq., appeared on behalf of plaintiff. Dayle Nolan, Esq., and Doug Kunin, Esq., appeared on behalf of defendant.

The Court enters the following Order:

1. Defendant's motion for the entry of summary judgment is granted to the extent that Counts II, III, and V, and Count I, to the extent that it addresses plaintiff's suspension from membership and discharge from employment, of plaintiff's Complaint are dismissed with prejudice. In all other respects, defendant's motion for the entry of summary judgment is denied.

2. Plaintiff's amended motion to compel and defendant's motion for a protective order are denied.

3. The attached Memorandum is made a part of this order.

BY THE COURT:

Dated: Feb. 10, 1993

s/s
Stephen D. Swanson
JUDGE OF DISTRICT COURT

MEMORANDUM

(A). Introduction

This action was commenced on July 8, 1992, and filed on September 10, 1992. In her Complaint, plaintiff alleges that she was a member of defendant Eckankar, a California nonprofit corporation; that in the Fall of 1989, she was hired by defendant as a systems analyst to help install a new computer system at an annual salary of $22,000; that she was denied access to the computer network for approximately one year; that male employees with less experience and training were granted immediate access to the computer network and were paid more than plaintiff; that plaintiff discussed her concerns with her supervisor, the president, and board members of defendant; that thereafter, plaintiff was warned not to speak with the president or board members, was criticized for every aspect of her work and personal habits, and was accused by male co-workers in front of other employees and outside vendors of being incompetent; that on June 21, 1991, plaintiff notified defendant's spiritual leader and members of the board of directors of her complaints and that defendant was in violation of the law; that on July 9, 1991, plaintiff was placed on a leave of absence by defendant's director of spiritual services and warned in writing that if she persisted in trying to impose her feelings and will on the spiritual direction of defendant, she could be suspended or excommunicated from the religion of Eckankar; that on August 6, 1991, plaintiff's membership in the religion of Eckankar was indefinitely suspended and because she was no longer a member, her employment was terminated; that plaintiff was advised in writing by defendants director of spiritual services that her suspension was the result of her disregard of the sacred teachings of Eckankar, as manifested by her failure to work in harmony with her co-workers; that at

all times, plaintiff performed her job in a competent and professional manner; that prior to her discharge, plaintiff was not advised that her job performance was unsatisfactory; that plaintiff was replaced by a male; that in its hiring practices, defendant discriminates against female applicants by asking illegal questions regarding marital status and child-bearing intentions, and by preferring employees who do not wish to have children; and that defendant pays female employees less than male employees for competent work. Based upon these allegations, plaintiff seeks damages and injunctive relief pursuant to statutory sex discrimination and reprisal claims under M.S. §363.03, subds. 1(2) and 7 (Counts I and II) and common law claims of defamation (Count III), promissory estoppel (Count IV), and negligent and/or intentional infliction of emotional distress (Count V).

Presently before the Court are plaintiff's amended motion of October 6, 1992 to compel responses to her interrogatories and request for production of documents and for an award of attorney's fees; defendants motion of November 3, 1992 for a protective order regarding plaintiff's discovery; and defendant's motion of October 21, 1992 for the entry of summary judgment dismissing plaintiff's claims with prejudice. In her discovery requests, plaintiff seeks information regarding the facts and circumstances surrounding her employment and discharge and her claims, as well as information regarding defendant's corporate structure, its internal governance mechanisms, its method for granting and terminating religious membership, its hiring, employment, and personnel policies, and its personnel structure. In the main, defendant has refused to provide the requested information on the grounds that this Court, based upon principles of statutory and constitutional law, does not have jurisdiction to adjudicate plaintiff's claims. In its motion for a protective order and its motion for summary judgment, defendant takes the same position, and does not base its motion for summary judgment upon an

analysis of the merits of plaintiff's claims. Accordingly, the disposition of defendant's motion for summary judgment will control the disposition of the parties' discovery motions as well.

(B). Facts

The evidence presented by defendant may be summarized as follows. In his Affidavit dated October 9, 1992, John K. Heyl states in part that defendant is a Minnesota nonprofit religious organization and an hierarchical church and religion; that he is an ordained priest and defendant's director of spiritual services; that the foundational concepts and teachings of defendant are found in the Bible of Eckankar and other written works and recorded lectures of the founder of defendant, Paul Twitchell, and its current spiritual leader, Harold Kemp; that defendant was founded in 1965; that he determined that plaintiff was apostate, and her membership in defendant was suspended on August 6, 1991; that because membership in defendant is a condition of employment with defendant, plaintiff's employment was terminated; that defendant has tens of thousands of followers worldwide; that defendant has 48 state church subordinates in its hierarchical structure in the United States and numerous subordinates in other countries; that defendant's headquarters facility is in New Hope, Minnesota; and that defendant has constructed a Temple in Chanhassen, Minnesota. In his Supplemental Affidavit dated November 17, 1992, Peter Skelskey states that he is the president of defendant; that the religion of Eckankar is recognized in a United States Army chaplain's handbook on the religious requirements and practices of selected groups, by the United States Bureau of Prisons, and by the United States Veteran's Administration as one of 28 religious symbols authorized for inscription on government furnished monuments; that worship services are held at defendant's

temple in Chanhassen; that defendant publishes booklets and brochures describing the religion of Eckankar; and that defendant was incorporated as a Minnesota nonprofit religious organization on October 16, 1985. In his Affidavit of October 21, 1992, Mr. Skelskey states that he is familiar with defendant's hiring, employment, and compensation policies; that decisions regarding the selection of members of defendant for employment with defendant and their assignment to specific jobs are connected to matters of church doctrine and practice and are based in part upon spiritual insights and guidance; that employee-only worship services are regularly held at defendant's headquarters facility; that employees are expected to observe and understand the spiritual significance of their job duties; that defendant's computer systems provide the means of communication with defendant's worldwide membership; and that plaintiff was expected to understand and follow the spiritual purposes and activities of defendant. In his Supplemental Affidavit of October 21, 1992, Mr. Heyl states that a spiritual review process was commenced as to plaintiff; that he met with plaintiff to determine her awareness of the spiritual context and implications of her actions; that by a letter to plaintiff dated July 9, 1991, he notified plaintiff that she faced suspension or excommunication from the religion of Eckankar and requested that she take several days to reflect on her decision; that plaintiff requested and was granted a paid leave of absence; that following a meeting with plaintiff, he delivered to her a letter dated August 5, 1991 suspending her membership in, and terminating her employment with defendant; that the reasons for plaintiff's termination were set forth in a letter to her dated August 16, 1991; that plaintiff's membership in defendant was suspended because plaintiff's actions demonstrated a withdrawal from the spiritual community of defendant; and that because membership status is a condition of employment, plaintiff's at-will employment was terminated.

The evidence submitted by plaintiff may be summarized as follows. In her Affidavit of November 6,1992, plaintiff states that she became a member of defendant in 1986; that on November 20, 1989, she was hired by defendant as a programmer/systems analyst; that defendant operates a commercial sales division and derives income from the sale of books, video and audio tapes, jewelry, and stationary; that defendant charges members to attend seminars and sells various classes of membership at different prices; that as an employee of defendant, plaintiff worked in an office building located in New Hope, Minnesota, and her duties involved computer training, programming, and hardware and software support; that during her employment, plaintiff was told that her work hours were from 8:00 a.m. to 5:00 p.m., Monday through Friday, and was given information regarding her job duties and employee benefits; that neither during the job interview process nor during her employment was plaintiff advised that she was expected to follow certain doctrines or precepts; that plaintiff was classified by defendant during her employment as a 2nd level initiate, and was not required to be a leader or role model for other employees or members of defendant; that plaintiff brought her complaints to the attention of other employees and certain members of defendant's board of directors and three members of defendant's "Spiritual Council," that plaintiff did not refuse to meet with Mr. Heyl or to participate in a spiritual forum, and is unaware of any adjudicative ecclesiastical process of which she was the subject; that plaintiff did not request an extended leave of absence, but rather was directed by Mr. Heyl to leave the office on July 10, 1992 and take some time to consider the consequences of her complaints; that during a meeting with plaintiff on August 6, 1991, Mr. Heyl requested that plaintiff give up her complaints against defendant, and when she refused, Mr. Heyl gave plaintiff a letter suspending her membership in, and terminating her employment with

defendant; and that plaintiff never heard the leaders of defendant referred to as "clergy."

In January 1989, defendant made an application to the City of Chanhassen, Minnesota, for a conditional use permit for the construction of a church on property owned by defendant. Affidavit of Mary L. Senkbeil dated November 17, 1992, para. 3. In a letter in support of its application and at the Chanhassen city Council meeting at which the application was considered, representations were made on behalf of defendant that the building to be constructed would be used for a sanctuary, caretaker's residence, classroom space, and office space to serve administrative staff of the church only, and that the international headquarters of defendant would remain in New Hope. Id., paras. 5-7 and Exs. A and B.

(C). Analysis

(1). Introduction

Pursuant to Minn. R. Civ. P. 56.03, a party moving for summary judgment must establish that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law. A motion for summary judgment must be supported by affidavits, deposition transcripts, or other admissible evidence. Minn. R. Civ. P. 56.05. Once a properly supported motion for summary judgment is made, the party opposing the motion must establish the existence of a genuine issue of material fact through an offer of significant probative evidence; the nonmoving party may not rely on the allegations in its pleading. See, e.g., Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986); Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W.2d 507 (1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 714-15 (Minn. App. 1989).

Moreover, the nonmoving party must establish that there is a genuine issue of material fact as to each essential element of its claim(s). E.g., Hough Transit, Ltd. v. National Farmers Organization, 472 N.W.2d 358, 360 (Minn. App. 1991). Hearsay may not be considered. Murphy, 307 Minn. 344, 349, 246 N.W.2d 507, __; Blackwell v. Eckman, 410 N.W.2d 390, 391 (Minn. App. 1987). If the Court determines that the evidence, if offered at trial, would be sufficient to avoid a directed verdict, the Court must deny the motion. E.g., Murphy, 307 Minn. 344, 351-52, 240 N.W.2d 507, __; Carlisle, 437 N.W.2d 712, 715.

Plaintiff has not offered sufficient probative evidence to establish the existence of a genuine issue of material fact, or to justify further discovery regarding the questions whether defendant is a religious organization and whether membership in the Eckankar faith is a condition of employment with defendant. However, plaintiff has offered sufficient probative evidence to establish the existence of a genuine issue of material fact regarding the merits of her claims and regarding the question whether her suspension from church membership was a pretext for her discharge. Therefore, the question presented by defendants prediscovery motion for summary judgment is whether, notwithstanding the existence of a genuine issue of material fact, defendant is entitled to judgment as a matter of law dismissing plaintiff's Human Rights Act and common law claims with prejudice on the grounds that the enforcement of those claims will violate defendants statutory and constitutional rights. The determination of that question requires an analysis of the Minnesota Human Rights Act, the free exercise clause of the First Amendment to the United States Constitution, the establishment clause of the First Amendment to the United States Constitution, and article I, §16 of the Minnesota Constitution.

(2). Minnesota Human Rights Act

Plaintiff's sex discrimination and reprisal claims (Counts I and II) are based upon the following provisions of the Minnesota Human Rights Act:

> Subdivision 1. Employment. Except when based on a bona fide occupational qualification, it is an unfair employment practice:
>
> * * *
>
> (2) For an employer, because of ... sex...
>
> (b) to discharge an employee; or
>
> (c) to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities or privileges of employment.
>
> * * *
>
> Subd. 7. Reprisals. It is an unfair discriminatory practice for any employer ... to intentionally engage in any reprisal against any person because that person:
>
> (1) opposed a practice forbidden under this chapter or has ... participated in any manner in an investigation, proceeding or hearing under this chapter...
>
> * * *

> A reprisal includes, but is not limited to, any form of intimidation, retaliation, or harassment. It is a reprisal for an employer to ... depart from any customary employment practice; transfer or assign the individual to a lesser position in terms of wages, hours, job classification, job security, or other employment status....

M.S. §363.03, subds. 1(2), 7. In pertinent part, the Human Rights Act provides that "[t]he provisions of section 363.03, subdivision 1, shall not apply to:

> (2) A religious or fraternal corporation ... with respect to qualifications based on religion, when religion shall be a bona fide occupational qualification for employment....

M.S. §363.02, subd. 1(2).

Defendant argues that this Court can and should avoid the constitutional issues raised in this case by interpreting the provisions of M.S. §363.02, subd. 1(2) as precluding plaintiff's sex discrimination and reprisal claims. More particularly, defendant argues that because membership in the Eckankar faith was a bona fide occupational qualification for employment with defendant, and because plaintiff's membership in Eckankar was suspended, plaintiff may not pursue her sex discrimination and reprisal claims notwithstanding the fact that plaintiff seeks to establish that the suspension of her membership in Eckankar was a pretext for defendant's actions. An analysis of defendant's statutory construction argument depends upon an interpretation of §363.02, subd. 1(2).

Title VII of the federal Civil Rights Act contains a similar exemption, and because of the substantial similarities between Title VII and the Minnesota Human Rights Act, this Court

may apply principles that have evolved in the adjudication of claims under the federal act in its analysis of M.S. §363.02, subd. 1(2). Sigurdson v. Isanti County, 448 N.W.2d 62, 67 (Minn. 1989); Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 623 (Minn. 1988). As with the federal exemption, the purpose of M.S. §363.02, subd. 1(2) is to minimize governmental interference with the decision-making process of religious organizations, and does not violate the establishment clause of the First Amendment. See, Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 107 S.Ct. 2862, 2868 (1987). Under both the federal and Minnesota exemptions, a religious organization may condition employment upon membership, and may freely discriminate, on the basis of religion, against non-members. E.g., Little v. Wuerl, 929 F.2d 944 (3rd Cir. 1991).

A more difficult question is presented when the religious organization is alleged, as it is in this case, to have discriminated on some basis other than religion, such as race, creed, or national origin, against an employee whose work is connected with the organization's religious activities. Most courts that have addressed this issue have held that the Title VII exemption does not extend to sex, race, and national origin discrimination. E.g., EEOC v. Pacific Press Publishing Assoc., 676 F.2d 1272, 1277 (9th Cir. 1982); Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1166 (4th Cir. 1985); McClure v. The Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972). The Pacific Press case is instructive. There, Pacific Press Publishing Association, a nonprofit religious publishing house affiliated with the Seventh-Day Adventist Church, required that all employees be church members in good standing. Based upon a determination by the church hierarchy that the complainant, a female editorial assistant, had "failed to meet the requisite high standards of adherence to Bible teachings and church authority

because... [she] had sued the church... [and was] at variance with the church and unresponsive to spiritual counseling," she was discharged, although she remained a church member in good standing. 676 F.2d 1272, 1275. In affirming the lower court's decision that Pacific Press was liable under Title VII for sex and reprisal discrimination, the Ninth Circuit Court of Appeals held that Congress intended to prohibit religious organizations from discriminating among their employees on the basis of race, sex, or national origin. Id. at 1277. The court stated as follows:

> We reject the argument that the exemption provided in section 702 applies to all actions taken by an employer with respect to an employee whose work is connected with the organization's 'religious activities.'

Id. Defendant cites the Little case as contrary authority. In Little, a protestant teacher claimed that a Catholic school's failure to renew her teaching contract on the grounds that her re-marriage violated church doctrine violated Title VII. In holding that there was no violation, the Third Circuit Court of Appeals interpreted the Title VII exemption very broadly:

> [W]e are also persuaded that Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.'

929 F.2d 944, 951. However, a close reading of Little reveals that the court's reasoning was based in large part upon a constitutionality perspective:

> Title VII has been interpreted to bar race and sex discrimination by religious organizations toward their non-minister employees. But attempting to forbid religious discrimination against non-minister employees where the position involved has any religious significance is uniformly recognized as constitutionally suspect if not forbidden (emphasis added).

Id. at 947-48. The Court believes that the better view of the scope of the religious organization exemption is the view expressed in the Pacific Press, Rayburn, and McClure decisions, and concludes that M.S. §363.02, subd. 1(2) does not exempt religious organizations from claims based upon sex, race, and national origin discrimination.

Defendant argues, however, that it is covered by M.S. §363.02, subd. 1(2) because membership in Eckankar was a bona fide occupational qualification, and because plaintiff was discharged on the basis of religion upon the suspension of her membership. Initially, the Court observes that plaintiff's sex discrimination claim is based, in part, upon her treatment while she was employed by defendant. But more importantly, the Court believes that the construction of §363.02, subd. 1(2) should not depend upon a distinction between a religious organization's termination of an employee for failure to comply with church doctrine and a religious organization's suspension from church membership of an employee for failure to comply with church doctrine, followed by termination from employment based upon the loss of membership. See, Pacific Press, 676 F.2d 1272. Such a distinction would elevate form over substance. The distinction does raise the question of pretext, and that question is better addressed in the constitutional analysis which follows. Suffice it to say here that the Court concludes that defendant is not entitled to a

dismissal of plaintiff's Human Rights Act claims on the basis of the exemption provided in M.S. §363.02, subd. 1(2).

(3). Free exercise clause

The free exercise clause of the First Amendment to the United States Constitution is made applicable to the states through the Fourteenth Amendment. E.g., Employment Division, Department of Human Resources of Oregon v. Smith, __ U.S. __, __, 110 S.Ct. 1595, 1599 (1990); Black v. Snyder, 471 N.W.2d 715, 718 (Minn. App. 1991), rev. den., Aug. 29, 1991. As recognized recently by the Minnesota Supreme Court, the United States Supreme Court, in Smith, altered its analysis of the free exercise clause by abandoning the balancing test which allowed a burden on the exercise of religion only if the state's interests were compelling in favor of a more narrow analysis. Hill-Murray Federation of Teachers v. Hill-Murray High School, 487 N.W.2d 857, 862 (Minn. 1992); see also, Black, 471 N.W.2d 715, 719. In Smith, the United States Supreme Court ruled that the denial of unemployment insurance benefits to employees who were discharged for ingesting peyote, an illegal controlled substance under state law, as part of a religious ceremony did not abridge their rights under the free exercise clause. __ U.S. __, 110 S.Ct. 1595. The Court held simply that the free exercise clause does not bar the application of a neutral, generally applicable state law to religiously motivated action, and limited the concept that governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest to hybrid cases combining religiously motivated action with other constitutionally protected actions, such as freedom of speech or the right of parents to educate their children. __ U.S. __, __, 110 S.Ct. 1595, 1601-03. Hill-Murray states the Smith test as follows:

> The Smith analysis holds that a generally applicable and otherwise valid regulatory law which was not intended to regulate religious conduct or belief and which incidentally burdens the free exercise of religion does not violate the free exercise clause of the first amendment.

487 N.W.2d 857, 862. Hill-Murray also recognized that "Smith retained the compelling interest test for so called hybrid situations in which the regulatory law impacts the free exercise of religion and some other constitutionally protected interest." Id. Given Smith, earlier decisions analyzing the free exercise clause are of little value. E.g., Rayburn, 772 F.2d 1164; Pacific Press, 676 F.2d 1272; EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980).

Applying a pre-Smith analysis of the free exercise clause, courts have fashioned an exception to enforcement under Title VII in cases involving the intimate relationship between a church and its ministers. E.g., Rayburn, 772 F.2d 1164, 1168; McClure, 460 F.2d 553, 559. This so-called "minister exception" may continue to have some vitality in Title VII cases involving the clergy. Scharon v. St. Luke's Episcopal Presbyterian Hospital, 929 F.2d 360, 363 (8th Cir. 1991). However, the concerns which gave rise to the exception are more appropriately addressed in the analysis of the establishment clause.

Application of the Smith test to the instant case is straight-forward. The Minnesota Human Rights Act is a valid, facially-neutral regulation of general applicability. State by McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 851 (Minn. 1985); Black, 471 N.W.2d 715, 719. It was not intended to regulate religious conduct or belief. Similarly, Minnesota's common law relating to defamation, promissory estoppel, and negligent and/or intentional infliction of emotional distress is content neutral. Black, 471 N.W.2d 715,

719. Accordingly, while enforcement of plaintiff's Human Rights Act and common law claims may incidentally burden defendant's free exercise of religion, that enforcement does not violate defendant's free exercise rights.

Defendant argues that this case is a hybrid case under Smith because enforcement of plaintiff's claims would intrude upon defendant's right of freedom of association, as well as its right to the free exercise of religion. The argument is too facile as every disciplinary decision by a religious organization could be viewed in the broadest context as impacting upon freedom of association. In any event, the question of compelling governmental interest will be addressed in the Court's analysis of article I, §16 of the Minnesota Constitution. See, State of Herschberger, 462 N.W.2d 393, 396-97 (Minn. 1990).

In conclusion, defendant is not entitled to a dismissal of plaintiff's claims on the grounds that enforcement of those claims would violate defendant's right to the free exercise of religion.

(4). Establishment clause

Review of an establishment clause claim begins with the three-prong analysis enunciated in Lemon v. Kurtzman:

> First, the statute must have a secular legislative purpose; second, the principal or primary effect must be on that neither advances nor inhibits religion (citation omitted); finally, the statute must not foster 'an excessive entanglement with religion' (citation omitted).

403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111. The Lemon analysis has been universally applied. E.g., Amos, 483 U.S. 327, __, 107 S.Ct. 2862, 2868; Hill-Murray, 487 N.W.2d 857,

863; Pacific Press, 676 F.2d 1272, 1281; Mississippi College, 626 F.2d 477, 486; Black, 471 N.W.2d 715, 719-20. As to the first prong of the analysis, a secular legislative purpose is one aimed at preventing the government decisionmaker from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters. Amos, 483 U.S. 327, __, 107 S.Ct. 2862, 2868. As to the second prong of the analysis, while a statute may have the effect of allowing the advancement of religion, the principal or primary effect must be one that neither advances nor inhibits religion. Amos, 483 U.S. 327, __, 107 S.Ct. 2862, 2869. As to the third prong of the analysis, Lemon enunciated the following test:

> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefitted [or impacted], the nature of the aid [or enforcement] that the State provides, and the resulting relationship between the government and the religious authority.

403 U.S. 602, 614-15, 91 S.Ct. 2105, 2114; e.g., Hill-Murray, 487 N.W.2d 857, 864; Pacific Press, 676 F.2d 1272, 1282; Mississippi College, 626 F.2d 477, 486; Black, 471 N.W.2d 715, 720. In determining the question of "excessive entanglement," it is important to ascertain whether the statute or its enforcement avoids an intrusive inquiry by the decision-maker into religious beliefs. Amos, 483 U.S. 327, __, 107 S.Ct. 2862, 2869. In Black, the Minnesota Court of Appeals stated the point as follows:

> When claims involve 'core' questions of church discipline and internal governance, the Supreme Court has acknowledged that the inevitable danger of government entanglement precludes judicial review.

471 N.W.2d 715, 720. See also, Scharon, 929 F.2d 360, 363; Little, 929 F.2d 944, 948-49. The litigation process, itself, may produce excessive entanglement. Rayburn, 772 F.2d 1164, 1172. Other courts have looked to the question whether continuous supervision would result from enforcement. E.g., Hill-Murray, 487 N.W.2d 857, 864; Pacific Press, 676 F.2d 1272, 1282. Excessive entanglement is always a question of degree. Black, 471 N.W.2d 715, 721.

In most sex and race discrimination cases, the issue of pretext is raised, and that issue presents difficult questions regarding excessive entanglement because it necessitates a review of the employer's motives. As stated by the Minnesota Court of Appeals, "[i]nquiry into a church's reasons for rejecting an individual for pastorship, even for the purpose of showing pretext, would cause excessive entanglement." Black, 471 N.W.2d 715, 720. See also, Scharon, 929 F.2d 360, 363 (focus on pretext would necessarily require an inquiry into the good faith of the position asserted by the church).

In applying the Lemon analysis to the present case, the Court concludes that because the Human Rights Act and the decisional law underlying plaintiff's common law claims have a secular legislative purpose and their principal or primary effect neither advances nor inhibits religion, the only question presented is whether the enforcement of plaintiff's claims will foster an excessive entanglement with religion. E.g., Scharon, 929 F.2d 360, 362; Black, 471 N.W.2d 715, 719-20. Defendant claims that its hiring of plaintiff, assignment of her job duties, review of her performance and compliance with church doctrine, and her suspension from membership and discharge from employment were guided by religious doctrine and teachings. Plaintiff responds that the reasons stated by defendant are pretext and that plaintiff must be permitted to conduct discovery to be able to demonstrate that pretext.

Plaintiff makes several claims, some of which involve her treatment by defendant while an employee and others of which involve her termination from employment. She does not seek reinstatement. For example, plaintiff alleges that she was discriminated against on the basis of sex by defendant's refusal to give her access to the computer network for one year, by defendant's practice of paying male employees more than female employees for comparable work, and by defendant's practice of asking female job applicants questions regarding marital status and childbearing intentions and preferring female applicants who do not wish to bear children. These Human Rights Acts claims, as well as plaintiff's promissory estoppel claim, go to the question of hiring practices and working conditions. Plaintiff also claims that when she brought her concerns to the attention of defendant, defendant retaliated against her by criticizing her job performance and personal habits and by ultimately discharging her. These allegations give rise to a portion of plaintiff's Human Rights Act claims, as well as her defamation and infliction of emotional distress claims.

The evidence submitted by, and the arguments of the parties provide a fairly clear picture of the type of fact questions that would be presented to the trier of fact if this case goes forward. According to Mr. Skelskey, defendant's president, decisions regarding the hiring of Eckankar members as employees and their assignment to specific jobs are based in part upon spiritual insights and guidance, employee-only worship services are regularly held at defendant's headquarters facility, and employees are expected to observe and understand the spiritual significance of their job duties. Plaintiff responds that neither during the job interview process nor during the course of her employment was she advised that she was expected to follow certain doctrines or precepts, that her duties were strictly secular, and that although she was classified by defendant as a 2nd level initiate, she was not

required to be a leader or role model for other employees or members of defendant. A determination of plaintiff's claims regarding defendant's hiring and job assignment practices would arguably require a review by the trier of fact of the spiritual and doctrinal underpinnings for those practices. According to Mr. Heyl, an ordained priest and defendant's director of spiritual services, when plaintiff's complaints were brought to defendant's attention, a spiritual review process was commenced, he met with plaintiff to determine her awareness of the spiritual context and implications of her actions, he gave her written notice that she faced suspension or excommunication and offered her a paid leave of absence for reflection, and plaintiff's membership was suspended and she was discharged upon a finding by church authorities that she was apostate. Plaintiff responds that she was required to take a leave of absence and that she is unaware that she was the subject of an adjudicative ecclesiastical process. A determination of plaintiff's claims regarding her suspension and discharge would require a thorough review by the trier of fact of the respective roles of defendant's director of spiritual services, defendant's board of directors, and defendant's "Spiritual Council," the purpose and scope of defendant's spiritual review process, and the spiritual and doctrinal underpinnings of defendant's hierarchical structure and spiritual review process. The trier of fact's review would be predicated upon thorough discovery and the presentation of evidence at a trial. In short, pretext would be the critical issue.

The Black decision is particularly instructive to an analysis of the excessive entanglement prong of the Lemon establishment clause test. In Black, the plaintiff was hired as an associate pastor at a church that was a member of a national synod. Plaintiff filed a Human Rights Act claim alleging that her supervising pastor repeatedly made unwelcome sexual advances toward her. Within three months

following her claim, the church discharged plaintiff based upon a finding that she was unable to conduct the duties of her pastoral office efficiently in view of "local conditions." The plaintiff commenced an action against the church, the synod, and the supervising pastor, stating claims of sexual harassment and reprisal under the Human Rights Act, breach of contract, defamation, and wrongful termination under the "whistle blower" statute. Upon defendants' motion to dismiss, the trial court dismissed the plaintiff's claims for lack of subject matter jurisdiction. 471 N.W.2d 715, 717-18. In affirming the trial court's decision as to all claims except the sexual harassment claim, the Court of Appeals undertook a thorough analysis of the excessive entanglement prong of the Lemon test, and reasoned as follows:

> When claims involve 'core' questions of church discipline and internal governance, the Supreme Court has acknowledged that the inevitable danger of governmental entanglement precludes review.
>
> * * *
>
> Inquiry into a church's reasons for rejecting an individual for pastorship, even for the purpose of showing pretext, would cause excessive entanglement. However, when the pastor's claims do not require such inquiry, but may be resolved by relying on 'neutral methods of proof,' the first amendment does not prevent judicial review (citations omitted).
>
> * * *
>
> [Because plaintiff's] breach of contract, retaliation, and statutory 'whistle-blower' claims relate specifically to factors of her appointment as an associate pastor and discharge... [they] are

> fundamentally connected to issues of church doctrine and governance and would require court review of the Church's motives....
>
> * * *
>
> [Plaintiff's defamation claim goes to the church's stated reason for her discharge and] would require a similar review of the church's reasons for... [the discharge,] an essentially ecclesiastical concern.
>
> * * *
>
> [Plaintiff's] sexual harassment claim is unrelated to pastoral qualifications or issues of church doctrine. Because she does not seek reinstatement but only monetary damages, any prospective remedy would not require extensive court oversight.

Id. at 720-21. Based upon this reasoning, the Court held that the enforcement of the plaintiff's reprisal, breach of contract, defamation, and "whistle-blower" claims would result in excessive entanglement.

Other courts have made a distinction between clergy and lay employees. Compare Scharon, 929 F.2d 360, and Rayburn, 772 F.2d 1164, with Pacific Press, 676 F.2d 1272, and Mississippi College, 626 F.2d 477. In the Court's view, this distinction largely misses the mark because although a church's relationship to its clergy traditionally presents a "core question of church discipline and internal governance," the proper focus of the inquiry should be on the nature of the church's relationship with the particular employee affected and the actions taken by the church toward that employee. That is the focus suggested by Black. See also, Hill-Murray, 487 N.W.2d 857, 864 (application of the Minnesota Labor Relations Act to lay employees of a parochial school will not result in excessive entanglement because its application "does

not include the potential for the state to mandate religious beliefs nor does it contemplate that the MLRA will force the parties to agree to specific terms").

Applying the analysis adopted in Black to the present case, the Court concludes that enforcement of plaintiff's Human Rights Act claims, to the extent that they address her suspension and discharge, and plaintiff's defamation and infliction of emotional distress claims would result in excessive entanglement because enforcement would necessitate a thorough inquiry into the respective roles of defendant's director of spiritual services, defendant's board of directors, and defendant's "Spiritual Council," the purpose and scope of defendant's spiritual review process, and the spiritual and doctrinal underpinnings of defendant's hierarchical structure and spiritual review process. A more difficult question is presented by plaintiff's promissory estoppel and Human Rights Act claims to the extent that they address defendant's hiring, compensation, and job assignment practices. While defendant argues that all its hiring, compensation, and job assignment decisions are guided by doctrinal considerations, it is significant that defendant does not admit that it discriminates against women in its hiring, compensation, and job assignment decisions, nor does it contend that church doctrine would support or compel such discrimination. Paraphrasing the Court of Appeals' reasoning in Block, this Court is unpresuaded that enforcing the Human Rights Act's prohibitions against discrimination, on the basis of sex, in hiring, compensation, and terms, conditions or privileges of employment, or enforcing plaintiff's common law promissory estoppel claim would actually burden defendant's religious practices. 471 N.W.2d 715, 721.

In conclusion, defendant is entitled as a matter of law to the entry of summary judgment dismissing plaintiff's defamation claim (Count III), plaintiff's negligent and/or intentional infliction of emotional distress claim (Count V),

plaintiff's Human Rights Act reprisal claim (Count II), and plaintiff's Human Rights Act sex discrimination claim (Count I) to the extent that it addresses her suspension and discharge. Defendant is not entitled, on establishment clause grounds, to a dismissal of plaintiff's promissory estoppel claim (Count IV) or plaintiff's Human Rights Act sex discrimination claim to the extent that it addresses hiring, compensation, and terms, conditions, or privileges of employment.

(5). Article I, §16 of the Minnesota Constitution

The Minnesota Supreme Court has held that the provisions of article I, §16 of the Minnesota Constitution afford greater protection for religious liberties against governmental action than the protection afforded by the First Amendment. Hill-Murray, 487 N.W.2d 857, 864-65, citing Herschberger, 462 N.W.2d 393. The protection afforded by article I, §16 extends to religious organizatoins, and the test to be applied in analyzing that provision has four prongs:

> whether the objector's belief is sincerely held; whether the state regulation burdens the exercise of religious beliefs; whether the state interest in the regulation is overriding or compelling; and whether the state regulation uses the least restrictive means

Hill-Murray, 487 N.W.2d 857, 865. Following the cautionary approach adopted in Hill-Murray, the Court will recognize the religious beliefs of Eckankar as being sincerely held. Id. Minnesota has an overriding compelling interest in prohibiting discrimination in employment, as embodied in the Human Rights Act. Herschberger, 462 N.W.2d 393, 398; Sports & Health Club, 370 N.W.2d 844, 853. Just as the Minnesota Supreme Court reasoned in Hill-Murray that a voluntary grievance procedure is not a viable alternative to enforcement

of the MLRA, this Court concludes that defendant's spiritual review process is not a viable alternative to enforcement of the Human Rights Act and that a less restrictive means of enforcement of the State's interest in prohibiting discrimination in employment does not exist. 487 N.W.2d 857, 867.

The remaining question presented under the Hill-Murray four-prong analysis is whether enforcement of plaintiff's claims would burden defendant's exercise of its sincerely held religious beliefs. In Hill-Murray, the Supreme Court recognized that the application of the MIRA to the lay employees of a parochial high school would result in continued enforcement by the Minnesota Bureau of Mediation Services of the school's obligation to negotiate in good faith with the certified bargaining unit as to wages, hours, and conditions of employment. 487 N.W.2d 857, 864. Notwithstanding the intrusive and on-going nature of the Bureau's jurisdiction and involvement, the Court reasoned that the enforcement of the MLRA would not excessively burden the church's exercise of its religious beliefs. Id. at 866. In the Court's view, the factors to be analyzed in reviewing the excesive burden prong of the Hill-Murray test are the same as the factors to be analyzed in reviewing the excessive entanglement prong of the Lemon establishment clause test, and therefore, the Court reaches the same conclusion as to article I, §16 that it reached with respect to the establishment clause. In short, the Court concludes that enforcement of plaintiff's promissory estoppel claim and her Human Rights Act claim, to the extent that it addresses hiring, compensation, and terms, conditions, and privileges of employment, will not excessively burden defendant's exercise of its sincerely held religious beliefs.

(D). Conclusion

For the foregoing reasons, the Court will grant defendant's motion for summary judgment to the extent that plaintiff's Human Rights Act reprisal claim (Count II), plaintiff's defamation claim (Count III), plaintiffs negligent and/or intentional infliction of emotional distress claim (Count V), and plaintiff's Human Rights Act sex discrimination claim (Count I), to the extent that it addresses her suspension and discharge, will be dismissed with prejudice. In all other respects, defendant's motion for summary judgment will be denied. Discovery may proceed as to the balance of plaintiffs claims. However, because the Court believes that plaintiff should propound interrogatories and requests for production that are narrowly tailored to her remaining claims, the Court will deny her amended motion to compel. Finally, the Court will deny defendant's motion for a broad protective order.

S.D.S.

FILED
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No. 94-2021

In the
Supreme Court of the United States
October Term, 1994

CAROL A. GERACI,

Petitioner,

vs.

ECKANKAR, a California nonprofit corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Minnesota Court of Appeals' holding that the Minnesota Constitution requires dismissal of petitioner's claims is an adequate and independent state ground for its decision, which deprives this Court of jurisdiction under 28 U.S.C. § 1257.

2. Whether the Minnesota district court can, consistent with both the Minnesota Constitution and the Establishment Clause of the United States Constitution, engage in an inquiry to determine whether the excommunication of petitioner was in accordance with the religious law of the church.

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No. 94-2021

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

CAROL A. GERACI,

Petitioner,

and

ECKANKAR, a California nonprofit corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

Petitioner seeks review of a decision of the Minnesota Court of Appeals[1] that is based upon adequate and independent state grounds under the Freedom of Conscience Clause of the Minnesota Constitution. In addition to this

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[1] The Petition is styled as seeking a writ of certiorari to the Minnesota Supreme Court rather than to the Minnesota Court of Appeals. Where, as here, the higher court declines to exercise its authority, the judgment of the intermediate court rather than the order of refusal by the higher court is the judgment reviewable under 28 U.S.C. § 1257. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n. 1 (1986); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 (1954).

glaring jurisdictional defect -- which petitioner does not address -- the Establishment Clause argument presented in the Petition is unsupported by authority from this or any lower court. Finally, although petitioner asks the Court to rule on the constitutionality of the Religious Freedom Restoration Act of 1993, the courts below did not apply the Act and thus it is not at issue. The Petition is therefore without jurisdictional or substantive basis.

STATEMENT OF CASE

1. Respondent Eckankar, a California nonprofit corporation, is a religion and hierarchical church that has subordinate churches in 48 states and throughout the world. Pet. App. A4. There are tens of thousands of followers of Eckankar worldwide. About half of its membership is in the United States and half is spread through more than 100 other countries. Eckankar is a well recognized religion (see Pet. App. A4, A26, A30), and petitioner does not contest that its beliefs are sincerely held. *Id.* at A13.

Petitioner Carol Geraci became a member of Eckankar in 1986 and received her Second Initiation -- which signifies a deepened commitment to the faith -- in 1989. Pet. App. A5. Shortly thereafter, she was hired as a computer systems analyst at the seat of church governance -- Eckankar's international church headquarters in Minnesota. Eckankar's computer systems provide the means of communication with its worldwide membership, and are a repository for sensitive and confidential clergy communications, religious and doctrinal correspondence, and church membership records. Pet. App. A27; Wollan 10/9/92 affidavit; (attached to Eckankar's 10/21/92 Motion for Summary Judgment). Petitioner's job provided her access to and control over the confidential records in the religion's central computer system

(Wollan 10/9/92 affidavit), and contact with the church's Board of Trustees. Membership status is a condition of employment with the church (*id.* at A5), and employment decisions and the assignment of specific jobs are connected to matters of church doctrine and practice. Such decisions are based in part upon spiritual insights and guidance. *Id.* at A27. Petitioner was expected to understand and follow the spiritual purposes, doctrines, and activities of the church as she performed her duties in the course of her employment. Pet. App. A26-27.

During the last six to eight months of her employment at Eckankar's headquarters, petitioner stopped attending employee worship services, and her supervisor noted a serious "spiritual gap" in petitioner which the church sought to address. Geraci depo., pp. 719-722, 758; Wollan depo., pp. 398-400, 407, 421; (attached to Eckankar's 12/8/93 Opp. to Motion to Reconsider). Over a period of months and prior to sending notice to Eckankar of any legal claims, petitioner rejected Eckankar spiritual precepts, refused to accept church efforts to bridge the spiritual gap, and sought to arouse discord and disharmony in the church community and hierarchy. *Id.*, Geraci depo. at 599-601, 604-605, 722-723, 758; Wollan 11/17/93 affidavit; Heyl 10/9/92 affidavit. Later, the Director of Spiritual Services, Priest John K. Heyl, commenced a spiritual review which included a meeting with petitioner. Pet. App. A27. In August 1991, petitioner's membership in the church was suspended after the spiritual review established that she had failed to live by the spiritual laws and rules for church members and had demonstrated a withdrawal from the spiritual community of the church. Pet. App. A4-A5, A27. She had been found to be apostate, *id.* at A26, and therefore was suspended (excommunicated) from the religion. At no time has petitioner denied that she was apostate. Because church membership was and is a condition

of employment, petitioner's employment was terminated. *Id.* at A5, A27.

2. Petitioner brought suit in the Minnesota state court on July 8, 1992, alleging statutory sex discrimination and reprisal claims under the Minnesota Human Rights Act, Minn. Stat. § 363, along with various common law claims, based upon the suspension of her church membership and her subsequent termination (the "excommunication claims"). She also brought discrimination and promissory estoppel claims relating to the terms and conditions of her employment. The district court dismissed the excommunication claims under the "Freedom of Conscience" Clause of the Minnesota Constitution (Pet. App. A47),[2] and the Establishment Clause of the United States Constitution. Pet. App. A6, A45. Also, applying the test set forth by this Court in *Employment Div., Dep't of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990), the court held that dismissal of these same claims was not required under the Free Exercise Clause. Later, after extensive discovery, the court dismissed on nonconstitutional grounds petitioner's promissory estoppel claim, all but one of her defamation claims, and her claim of gender discrimination

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[2] The Freedom of Conscience Clause provides:

> The right of every man to worship God according to the dictates of his own conscience shall never be infringed, nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State. . . .

Minn. Const. art. I, § 16.

in the terms and conditions of employment.[3] The dismissal of these three claims was affirmed by the Minnesota Court of Appeals, also on nonconstitutional grounds (Pet. App. A7-A12), and no issue regarding these claims is raised in the Petition.

The Minnesota Court of Appeals also affirmed the district court's holding that dismissal of the excommunication claims was required by both the Minnesota Constitution and the Establishment Clause. It declined to rule, however, on Eckankar's argument on appeal that the district court should have applied the "compelling interest test," restored by the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as 42 U.S.C. § 2000bb), rather than the *Smith* test in its Free Exercise analysis. Because the excommunication claims were otherwise "barred by the Establishment Clause and Minnesota's Freedom of Conscience Clause," the court held, "the issue is moot." Pet. App. A19.

Geraci's petition to the Minnesota Supreme Court for further review of the rulings of the court of appeals was denied. Pet. App. A1.

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[3] The district court dismissed these claims on Eckankar's post-discovery summary judgment motion pursuant to the court's Order and Memorandum dated February 3, 1994. (Petitioner has failed to include this Order and Memorandum in her appendix as required by Rule 14(k) of this Court.)

REASONS FOR DENYING THE PETITION

A. The Court Lacks Jurisdiction to Review the Decision Below Because There Are Adequate and Independent State Grounds for the Court of Appeals' Affirmance of the Dismissal of Petitioner's Claims

As this Court has long recognized, "where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, [the Court's] jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977); *Ridgway v. Ridgway*, 454 U.S. 46, 54 (1981). If the state court decision clearly indicates that it is "alternatively based on bona fide separate, adequate, and independent grounds, [the Supreme Court] * * * will not undertake to review the decision." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). The jurisdictional concern is that the Court cannot "render an advisory opinion, and if the same judgment would be rendered by the state court after [the Supreme Court] corrected its views of federal laws, [the Supreme Court's] review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn, 324* U.S. 117, 126 (1945).

Absent from the Petition is any mention of the independent state grounds upon which the Minnesota Court of Appeals affirmed the district court's dismissal of the excommunication claims. According to the Petition, the court of appeals held only "that Eckankar was entitled to dismissal of Geraci's discharge claims because their enforcement would violate the Establishment Clause of the First Amendment." Pet. 4. However, there were two grounds for the court of appeals' deci-

sion, and the opinion of the court of appeals leaves no doubt that the state constitutional basis for its decision "is independent of the other [the federal ground] and broad enough to sustain the judgment." *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917).

The state court judgment need not literally state that its decision is supported by adequate and independent state grounds, so long as it is "indicate[d] with requisite clarity" in the opinion. *Sochor v. Florida*, 504 U.S. 527, 534 (1992). Here, the court of appeals made it abundantly clear that the state law ground for its decision was independent of the federal ground and adequate to support the judgment. Thus, this Court lacks jurisdiction under 28 U.S.C. § 1257 and Article III of the U.S. Constitution. *Black v. Cutter Laboratories*, 351 U.S. 292, 300 (1956).

In enumerating the issues to be decided, the Court of Appeals demonstrated the independence of the state and federal grounds for its holding by specifying them as separate "Issues" to be addressed:

ISSUES

* * *

4. Does the Minnesota Constitution bar judicial review of Geraci's discharge-based claims?

5. Does the Establishment Clause bar judicial review of Geraci's discharge-based claims?

Pet. App. A6-7. *See California v. Freeman*, 488 U.S. 1311, 1314 (1989) (O'Connor, J., denying application for stay) (state statutory ground for California Supreme Court decision was independent of First Amendment ground where

the discussion of these grounds "[wa]s divided into two subsections" of the state supreme court's opinion).[4]

The court of appeals also demonstrated the independence of the bases for its holding by addressing whether the excommunication claims were barred by either state or federal law in separate sections of the opinion. Noting that the Freedom of Conscience Clause "affords greater protection of religious freedom" than does the Free Exercise Clause of the First Amendment (Pet. App. A13), the court addressed the requirements of the Minnesota Constitution in section 4 of the opinion, and found that the excommunication claims were barred under the four-prong test set forth by the Minnesota Supreme Court in *Hill-Murray Fed'n of Teachers v. Hill-Murray High School, 487* N. W. 2d 857 (Minn. 1992). The *Hill-Murray* test is expressly and solely an interpretation of state law.[5]

Applying the *Hill-Murray* test, the court of appeals found no dispute that Eckankar's religious beliefs are sincerely held (Pet. App. A13), and that the eradication of discrimination where it exists is a compelling state interest. Pet. App. A14 (citing *State by McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 854 (Minn. 1985)). Under the second prong, however, the court found that "[f]urther application of the [Minnesota Human Rights] Act to Eckankar, * * * would ex-

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[4] The independent state and federal grounds for the court of appeals' decision also are stated as separate points in the syllabus to the opinion. Pet. App. A3.

[5] The four-prong test is (1) whether the objector's belief is sincerely held; (2) whether the regulation burdens the exercise of religious beliefs; (3) whether the state interest in regulation is overriding or compelling; and (4) whether the state regulation uses the least restrictive means. *Hill-Murray*, 487 N.W.2d at 865.

cessively burden its religious beliefs." Pet. App. A14. In its opinion, the appellate court relied upon language from the *Hill-Murray* decision which held that a church-run school had the right under the Minnesota Constitution "to require compliance with religious doctrine" and could "remove any person who fail[ed] to follow religious standards." Pet. App. A14-A15. Thus, the court concluded -- solely on the basis of state law -- that the excommunication claims had been properly dismissed by the district court.

In the next section of the opinion, as an alternative ground for affirmance, the appellate court concluded that judicial review of petitioner's excommunication claims would also violate the Establishment Clause of the First Amendment. Pet. App. A15-A18 (Section 5). The court first rejected petitioner's argument that the Establishment Clause bars review of only those employment claims involving ministers and clergy, and went on to hold that "the courts may not review Geraci's discharge-based claims" under either *Lemon v. Kurtzman,* 403 U.S. 602 (1971), or *Board of Educ. v. Grumet,* 114 S. Ct. 2481 (1994). Pet. App. A16. The opinion leaves no doubt that the Establishment Clause and the Minnesota Constitution were independent bases for the court of appeals' holding.

This treatment of the issue is consistent with rulings of the Minnesota Supreme Court, which draw a clear distinction between the requirements of the Freedom of Conscience Clause and those under the First Amendment of the United States Constitution. As that court has held, the language of the Freedom of Conscience clause "is of a distinctly stronger character than the federal counterpart . . . ." *State v. Hershberger,* 462 N.W.2d 393, 397 (Minn. 1990). In *Hershberger,* the Minnesota Supreme Court declined to engage in a Free Exercise analysis under the standard that had

been recently set forth in *Smith,* because it found that the protection of religious freedom afforded by the Minnesota Constitution was broader than under the First Amendment. Thus, the court held, "[i]t is unnecessary to rest our decision on the uncertain meaning of *Smith II* when the Minnesota Constitution alone provides an independent and adequate state constitutional basis on which to decide." *Hershberger,* 462 N.W.2d at 396-97 (citing *Michigan v. Long,* 463 U.S. 1032 (1983)). As in *Hershberger,* the court of appeals in this case found it unnecessary to rule on whether the district court should have applied the *Smith* test rather than the compelling state interest test in its analysis under the Free Exercise Clause, because the protection afforded by the state constitution provided independent grounds for affirming the holding of the district court. *See* Pet. App. A19.

The fact that the appellate court made reference in its discussion of the Minnesota Constitution to cases decided under the First Amendment of the United States Constitution (*see* Pet. App. A15), does not undermine the independent state grounds of its holding. The Minnesota Supreme Court has stated that in construing the Freedom of Conscience Clause, it is appropriate to look to such "creatures of federal doctrine" as "compelling state interest" and "least restrictive alternative" simply to "provide guidance" in interpreting the Minnesota Constitution. *Hershberger,* 462 N.W.2d at 398 (finding "independent and adequate state constitutional basis" for result under the Freedom of Conscience Clause) *id.* at 397.[6]

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[6] Where a state court relies on federal precedent in deciding an issue under state law, it need only make clear "that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." *Michigan v. Long,* 463 U.S. at 1041. The Minnesota Supreme Court has stated that, as a general matter, "a decision of the United

The court of appeals' explicit reliance on state grounds for its decision in this case is in sharp contrast to cases like *Michigan v. Long,* in which the state court decision rested "primarily on federal law," and the adequacy and independence of the state law grounds was "not clear from the face of the opinion." *Id.* at 1040-41. *Cf. Arizona v. Evans,* 115 S. Ct. 1185, 1190 (1995) (state grounds not adequate and independent where "Arizona Supreme Court's decision to suppress the evidence was based squarely upon its interpretation of federal law"); *Illinois v. Rodriguez,* 497 U.S. 177, 182 (1990) ("[t]he opinion does not rely on (or even mention) any specific provision of the Illinois Constitution, nor even the Illinois Constitution generally").

Unlike the state court holding under review in *Michigan v. Long,* in which "[n]ot a single state case was cited to support the state court's holding" (*463 U.S.* at 1043), the court of appeals here based its determination under the Freedom of Conscience Clause on a detailed examination and application of state law. Pet. App. A12-15. Its holding under the Minnesota Constitution was in no sense based "primarily on federal law."

For this reason, the Petition must be denied.

States Supreme Court interpreting a comparable provision of the federal constitution that * * * is textually identical to a provision of [the] [Minnesota] [C]onstitution, is of inherently persuasive, although not necessarily compelling, force." *In re Welfare of E.D.J.,* 502 N.W.2d 779, 781 (Minn. 1993) (quoting *State v. Fuller,* 374 N.W.2d 722, 726-27 (Minn. 1985)).

B. The Minnesota Court of Appeals Correctly Held that Plaintiff's Claims Are Barred by the Establishment Clause

The constitutional holding of the court of appeals is a routine and unexceptional application of well established principles to this particular factual context. It presents no conflict with any decision of this or any lower court. Nor does it, as suggested by petitioner, insulate religious bodies from liability for purportedly unlawful secular employment decisions. Rather, the decision expressed the narrow proposition that petitioner's excommunication was a core religious matter that could not be examined for pretext without violating the Minnesota Constitution or the Establishment Clause of the U.S. Constitution.

Petitioner does not dispute that church membership is a prerequisite to employment at the international headquarters of the Eckankar religion (Pet. App. A17), nor does she allege she was subjected to unlawful discrimination on the basis of religion. *Id.* at A14. There was no dispute that respondent limited employment to members in good standing of the religion. Nor is there any dispute that petitioner was, in fact, excommunicated from the church. Thus, the only disputed question of material fact raised by petitioner's complaint was whether the church's decision to excommunicate her was properly based on spiritual considerations, as opposed to being a pretext for sex discrimination.

It is hard to imagine a question less appropriate for civil court adjudication. As the court of appeals observed, it could not "devise a way to determine if this reason for [petitioner's] termination was a pretext for discrimination without questioning the reasons for the excommunication and the veracity of those reasons." Pet. App. A17-18. "Further litigation of

Geraci's claims would require a court to question Eckankar's monitoring of Geraci's adherence to church doctrine, its reasons for excommunication, and the veracity of Eckankar's responses." *Id.* at A15. It would violate central principles of separation of church and state for a secular court to second-guess the determinations of ecclesiastical bodies regarding so fundamental a religious issue as whether a member adheres to the precepts of the faith. As this Court has noted, "[c]ourts are not arbiters of scriptural interpretation." *Thomas v. Review Board,* 450 U.S. 707, 716 (1981).

The court of appeals thus held that judicial inquiry into Eckankar's reasons for excommunicating petitioner would cause excessive entanglement between church and state (Pet. App. A16-17) (citing *Lemon v. Kurtzman,* 403 U.S. 602 (1971)), and would violate "neutrality principles" under the Establishment Clause. Pet. App. A16-17 (citing *Board of Educ. v. Grumet,* 114 S. Ct. 2481 (1994)). The dismissal of petitioner's excommunication claims under this Court's Establishment Clause jurisprudence is plainly required.

Nonetheless, petitioner contends, Pet. 5, that the Minnesota court's application of the Establishment Clause "conflicts with federal appellate and U.S. supreme court (sic) decisions" -- a position that is totally unsupported by any case law from this or any other court. Pet. App. A5. Notably, petitioner cites no decision of any court that even remotely suggests that a civil court may intrude into the important and central religious question of excommunication. In fact, petitioner fails even to mention the Supreme Court authority on which the state court based its holding under the Establishment Clause. Furthermore, the cases on which she relies contradict her position.

The court below correctly relied on this Court's decision in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). In that decision, the Court held that state courts, when adjudicating civil cases, must defer to the decision of the highest church tribunals of hierarchical church organizations in matters touching doctrine and discipline. The Court held that "the First Amendment prohibits" civil courts from inquiring *either* into the "procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow," *or* into the "substantive criteria by which they are supposedly to decide the ecclesiastical question." *Id.* at 713. The Court has stressed that "questions of church discipline * * * are at the core of ecclesiastical concern" (*id.* at 717), and must be left to internal church governance, without governmental interference. "[W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity. . . ." *Id.* at 709. For a civil court to interpret church law in a case of church discipline such as this would present a "substantial danger that the State will become entangled in essentially religious controversies. . ." *Id.* at 709. *Accord Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952) (recognizing religious organizations' "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine") (citing *Watson v. Jones*, 13 Wall. 679, 727 (1871)); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) ("It is not only the conclusions that may be reached by [governmental entities] which may impinge the rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions"); *Rayburn v. General Conference of Seventh Day Adventists*, 772 F.2d

1164, 1169 (4th Cir. 1985), *cert. denied,* 478 U.S. 1020 (1986) (in "quintessentially religious" matters, "the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content") (citing *Milivojevich*, 426 U.S. at 720).

In the instant case, the highest authorities of a hierarchical church determined that petitioner failed to meet the church's religious standards and ceased to have faith in the spiritual teachings of the Eckankar religion. Accordingly, she was excommunicated. Pet. App. A5, A26. Petitioner seeks to require the civil courts of Minnesota to inquire into the procedural regularity and substantive validity of that determination. The basis for petitioner's claim is that the church's decision to excommunicate her was not justified under the tenets of its religious doctrine, but was rather a pretext for discrimination. Petitioner contests the proposition that she was excommunicated and then discharged "because she lost her faith" (Pet. 3), and asks that a Minnesota jury be permitted to reexamine that issue as a matter of fact.

To inquire into the reasons behind the petitioner's excommunication would entail -- as the district court found -- a "thorough inquiry into the respective roles of the [respondent's] director of spiritual services, their board of directors, their 'Spiritual Council,' the purpose and scope of their spiritual review process and the spiritual and doctrinal underpinnings of the [respondent's] hierarchical structure and spiritual review process." Pet. App. A45. It would also force discovery into religious discipline of other members of the church and the reasons for their discipline, for purposes of showing comparative treatment. It would require the court to determine if the church had properly applied its religious law. As in *Milivojevich,* this would require the court to "evaluat[e] conflicting testimony concerning internal church procedures"

and second-guess "the interpretations of * * * the Church's highest tribunals." *Milivojevich,* 426 U.S. at 718. "[T]his is exactly the inquiry that the First Amendment prohibits." *Id.* at 713.

Contrary to petitioner's suggestion at page 9 of her petition, the Minnesota courts did not simply accept "labeling" of the reason for petitioner's discharge as "core ecclesiastical." Rather, respondent provided a substantial threshold showing to the courts below concerning its religious beliefs, how they apply to church members, and how they applied to petitioner. Pet. App. A4-5, A26-A27. This undisputed submission included affidavits from Eckankar's Director of Spiritual Services, its President, and documentary evidence. Scrutiny of this showing correctly led the lower courts to conclude that the excommunication claims involved matters of core church doctrine and discipline which must be left to internal church governance. Pet. App. A13-A15, A17-18.

None of the cases cited by petitioner are in conflict with the court of appeals' reasoning. First, petitioner contends that the court of appeals' decision conflicts with this Court's holding in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986). In that case, the Court determined only that, based upon *Younger v. Harris*, 401 U.S. 37 (1971), the district court should have abstained from adjudicating the school's § 1983 case against the Ohio Civil Rights Commission. Far from rejecting the school's constitutional defenses, the Court simply held that the school would have "an adequate opportunity to raise its constitutional claims" within the context of the state court proceeding. 477 U.S. at 628, *see also id.* at 629. *Dayton Christian Schools* does not alter the constitutional analysis once those issues are raised by a religious institution. In the

instant case, the church has raised its constitutional defenses in precisely the way *Dayton Christian Schools* directs. To the extent petitioner means to suggest that under *Dayton Christian Schools* there can be no First Amendment protection for a religious organization against a discrimination claim, petitioner's position is contradicted, not supported, by the decision.

Petitioner cites two circuit court cases (Pet. 6-7) in which application of the Age Discrimination in Employment Act to a religious institution was found not to violate the First Amendment because the institution had asserted no religious reason for the challenged employment action. *See Weissman v. Congregation Shaare Emeth,* 38 F.3d 1038, 1045 (8th Cir. 1994) ("the Temple has asserted no religious grounds for Weissman's termination" and application of the ADEA to the Temple is not "sufficient to pose a significant risk of infringement upon the First Amendment where none of the reasons asserted for the adverse employment action rests on religious grounds"); *Geary v. Visitation of the Blessed Virgin Mary Parish School,* 7 F.3d 324, 329, 332 (3rd Cir. 1993) (plaintiff alleged a retaliation claim based on the cancellation of her health insurance, the school conceded it had no religious reason for the cancellation, and the court thus held that "the prosecution of [her retaliation] claim will not lead to any inquiry regarding Church doctrine").

In those cases, where the asserted reason for the adverse employment action had no religious component, adjudication of the claim raised no First Amendment concerns for the obvious reason that no religious issue was under review. In contrast, petitioner was discharged from her employment at Eckankar's headquarters because she was excommunicated for religious reasons. Pet. App. A17. Accordingly, review of petitioner's claim that the basis for her termination was

"pretextual" would involve evaluation and consideration of religious reasons and thus is prohibited under the Establishment Clause.

Petitioner also relies on cases in which state-imposed limitations on free exercise were upheld upon a showing that the limitations were "essential to accomplish an overriding governmental interest." *United States v. Lee*, 455 U.S. 252, 257-58 (1982) (allowing the government to require participation by the Amish in the social security system notwithstanding their religious objections); *Prince v. Massachusetts*, 321 U.S. 158 (1944); (overriding state interest in enforcing child labor laws); *Reynolds v. United States*, 98 U.S. 145 (1878) (state interest in prohibiting polygamy). Pet. 7-8. In each of these cases, the Court identified a particular religious practice -- the existence of which was not in dispute -- that it found incompatible with an overriding government interest. No such religious practice is at issue here.

Finally, petitioner cites cases like *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 304-05 (1985), and *Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983), Pet. 7-8, in which government regulation of a religious organization was constitutionally permissible where it would not "interfere with the . . . right to freely exercise their religious beliefs" in the first place. *Alamo*, 471 U.S. at 304-05. *Alamo Foundation*, however, is entirely consistent with the decision under review here. The Court rejected the church's claim of "entanglement" on the ground that the governmental investigation into wages and hours of employment involved only "routine and factual inquiries" that are not "intrusive into religious affairs." 471 U.S. at 305-06. It certainly does not stand for the proposition that the government may intrude into such deeply religious matters as

excommunication. *Bob Jones* is even farther from the mark. In that case, the religious school did not raise "entanglement" claims; the only Establishment Clause issue was one of denominational discrimination (461 U.S. at 604 n. 30), which has no bearing on this case.

In sum, none of the cases cited by petitioner conflicts in any way with the court of appeals decision at issue here. There is no reason for further review by this Court.

C. The Remaining "Questions Presented" in the Petition Provide No Basis for Further Review by this Court

The remaining Questions Presented in the Petition state no basis for further review. The second Question Presented -- "[w]hether the duties of a computer programmer are purely secular or a 'core ecclesiastical matter'"-- ignores the fact that the decision below was properly focused upon the reasons for the discharge. The proper focus is not, as petitioner would suggest, on who she is and what her duties were, but rather, on whether inquiry into reasons for her excommunication would intrude into forbidden constitutional territory. Since there was an ample showing that the discharge rested upon core ecclesiastical doctrine, there was no need to reach any issue concerning petitioner's job duties and the court did not do so. Thus, the court of appeals affirmed the district court's ruling "that inquiry into Eckankar's proffered reasons for [the petitioner's] termination, that is, her excommunication, was impermissible under the United States and Minnesota Constitutions." Pet. App. A12. The constitutional bar to litigation of such claims would apply regardless of the nature

of petitioner's duties.[7] There is no need or basis for this Court to address petitioner's second Question Presented.

Finally, petitioner asks the Court to rule on the constitutionality of the Religious Freedom Restoration Act of 1993 ("RFRA"), which restored the compelling interest test to the Free Exercise Clause. *See* Question Presented No. 3. The court below expressly declined to rule on respondent's RFRA defense, noting that because petitioner's claims were barred by both the Minnesota Constitution and the federal Establishment Clause, there was no need to address the RFRA claim. Pet. App. A19. Accordingly, the constitutionality of that statute is not at issue, and would not be a proper subject for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: July 19, 1995 Respectfully submitted,

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[7] Indeed this Court had upheld the constitutionality of a statutory exemption which recognizes the right of churches to discharge an employee -- even one with ostensibly secular duties -- when the employee lacks a religious qualification required by the church. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 325, 107 S. Ct. 2862 (1987) (building engineer dismissed from employment at nonprofit gymnasium).